84-1740

Office-Supreme Court, U.S.
FILED
MAY 2 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I. Whether Petitioner's published opinion was constitutionally privileged under the First Amendment.

II. Whether Respondent was a "limited-purpose public figure" for the purposes of the zoning controversy involving Petitioner's property.

III. Whether the evidence established clearly and convincingly that Petitioner knew that what he was publishing was false or that he had a reckless disregard for whether or not it was true.

IV. Whether Petitioner's constitutional guarantee of due process was violated, in the specific circumstances of this case, because Respondent exercised his peremptory strikes to create a jury without blacks.

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JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Petitioner, James N. Fleming ("Petitioner" or "Fleming"), respectfully prays that a writ of certiorari issue to review the judgment of the Supreme Court of Virginia rendered on February 1, 1985. That judgment, upholding the compensatory and punitive liability of Petitioner in this defamation action, abridges Petitioner's constitutional rights of free speech and due process. Petitioner seeks to vindicate those rights by way of this Petition for Writ of Certiorari.

OPINIONS BELOW

A copy of the Final Judgment Order in favor of W. Bedford Moore, III ("Respondent" or "Moore") entered by the Circuit Court of Albemarle County, Virginia, in the first trial of this case may be found at App. A.[1] In Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981), the Supreme Court of Virginia reversed the decision of the Circuit Court and remanded the case for a new trial (App. B).

The second trial of this case again resulted in a jury verdict for Moore (App. C). The Circuit Court of Albemarle County entered judgment on that jury verdict (App. E).

Fleming appealed to the Supreme Court of Virginia, asserting nine assignments of error. The Supreme Court of Virginia granted Fleming's appeal, but limited that appeal to four issues (App. F).[2] By opinion (App. G) and mandate

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1 Throughout his Petition, Petitioner will refer to the trial transcript as "(Tr. __)," to Moore's exhibits as "(PX __)," to his own exhibits as "(DX __)," and to the Appendices to this Petition as "(App. __)."

2 On September 5, 1984, Fleming filed with the United States Supreme Court a Petition for Writ of Certiorari seeking

(continued)

(App. H) dated February 1, 1985, the Supreme Court of Virginia upheld the compensatory and punitive liability of Fleming, but reversed as excessive both damage awards. The Supreme Court of Virginia directed the Circuit Court of Albemarle County to order Moore to accept a remittitur of "a substantial portion" of both the compensatory and punitive awards, or else submit to a new trial upon the issue of damages only.[3]

(continued from previous page)

review of two of the assignments of error raising federal constitutional issues over which the Supreme Court of Virginia declined to exercise jurisdiction. That Petition was denied on October 29, 1984, presumably because this Court found the Petition premature while potentially dispositive state law issues were pending before the Supreme Court of Virginia.

3 The jury in the second trial of this matter awarded Moore $100,000 compensatory damages, $250,000 punitive damages, and 12% prejudgment interest on the $250,000 award running from the date of the tort, January 16, 1976. Pursuant to the February 1, 1985, mandate of the Supreme Court of Virginia, the Circuit Court of Albemarle County held a remittitur hearing on April 16, 1985. The Circuit Court remitted the entire prejudgment interest award, one-third of the compensatory award, and one-third of the punitive award. Moore accepted without protest the total remitted damage award of $233,333.32. A final order embodying the action of the Circuit Court on remand has not been entered.

STATEMENT OF JURISDICTIONAL GROUNDS

Fleming properly presented his federal constitutional claims to both the Circuit Court of Albemarle County and the Supreme Court of Virginia. Although the Supreme Court of Virginia remanded the case to the Circuit Court, that remand was limited to the issue of damages only. The Supreme Court of Virginia's affirmance of compensatory and punitive liability constituted a final ruling on the federal constitutional issues involved in the affirmance of that liability, as well as on the federal constitutional issues over which the Supreme Court of Virginia declined to exercise jurisdiction. Cox Broadcasting Corp. v. Cohn, 420 U.S. 469, 476-87 (1975). Petitioner invokes this Court's certiorari jurisdiction under 28 U.S.C. § 1257(3) (1970).

Fleming seeks review of (1) the Circuit Court's rulings on October 7, 1982, and April 21, 1983, holding that Fleming's published opinion was not absolutely protected under the First Amendment (App. I; D); (2) the Circuit Court's rulings on October 22, 1982, and April 21, 1983, holding that Moore was a private rather than a public figure (App. J; D); (3) the Circuit Court's ruling on April 21, 1983, holding that

Moore had clearly and convincingly proved actual malice on the part of Fleming (App. D); (4) the Circuit Court's ruling on April 21, 1983, holding that the striking by Moore of all the black jurors was not a violation of Fleming's Fourteenth Amendment right to due process (App. K; D); (5) the Circuit Court's Final Judgment Order entered and dated June 3, 1983 (App. E); and (6) the Supreme Court of Virginia's affirmance on February 1, 1985, of compensatory and punitive liability (App. G; H). This Petition for Certiorari was filed within 90 days of the Supreme Court of Virginia's decision.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the United States Constitution and statutes relevant to the disposition of this case are:

1. Congress shall make no law . . . abridging the freedom of speech, or of the press . . .

U.S. Const. amend. I.

2. [N]or shall any State deprive any person of life, liberty, or property, without due

process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV.

3. Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .

(3) By writ of certiorari . . . where any title, right, privilege or immunity is specially set up or claimed under the Constitution . . .

28 U.S.C. § 1257(3) (1970).

STATEMENT OF THE CASE

This libel case emerges from the wake of a heated zoning controversy involving Fleming's plans to develop near the Rivanna Reservoir in Albemarle County, Virginia, a 128-acre low-to-middle income housing project, known as "Evergreen." Fleming is a black resident of Charlottesville, Virginia, his lifelong home. Moore, the respondent, is a white,

tenured assistant professor in the Humanities Division of the School of Engineering at the University of Virginia.

Fleming and Moore first met in 1971. At that time, Moore discussed with Fleming the possibility of purchasing a strip of Fleming's property that adjoined Moore's 102-acre residential estate, "Shack Mountain" (Tr. 103-04).[4] The parties, however, never reached an agreement.

In November 1974, after Fleming presented his first plans for Evergreen ("Evergreen I") to the Albemarle County planning authorities for review and approval, Moore again raised the possibility of purchasing a portion of Fleming's adjoining land. At trial, Moore stated that he wanted this land "to relieve" a narrow corner of his property containing his driveway (Tr. 65). Fleming responded by providing a plat to Moore and by agreeing to meet with him in a week or ten days (Tr. 65). Moore, however, changed his mind about the purchase and decided he could not privately

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4 During the height of the public controversy surrounding the proposed Evergreen development, Shack Mountain, built in a Jeffersonian style, received recognition by both the Virginia Historic Landmarks Commission and the National Register for Historic Places (Tr. 58, 59, 108, 133-34).

negotiate with Fleming because Moore intended to oppose publicly Fleming's housing development (Tr. 65-66). Moore wrote Fleming, stating:

> I write you as a courtesy to say that I have not followed up that proposed meeting with you and your partners because I have realized upon looking further into the matter, that I could not negotiate with you gentlemen in good faith and then turn around and oppose your project in the public hearings--as I feel I must do for the good of my neighbors and the county as a whole.

(PX 4; Tr. 66-67).

While certainly not the only development close to the reservoir, Evergreen I generated a unique storm of controversy. Moore became one of the principal antagonists of Fleming's proposed project, according to Gerald E. Fisher, Chairman of the Albemarle County Board of Supervisors (Tr. 442). Moore also became a visible leader of the opposition to Evergreen I. He attended most of the public meetings on Evergreen, speaking at many of them (Tr. 72, 79, 83, 157, 300, 333).

James B. Murray, Moore's attorney at the time, characterized him as a leader of the opposition against Evergreen (Tr. 289). In fact, as noted above, Moore ended his

negotiations with Fleming regarding the purchase of a portion of the Evergreen property because Moore felt he had to oppose publicly Fleming's project "for the good of my neighbors and the county as a whole" (PX 4; Tr. 66-67).

Moore's public opposition to Evergreen I was successful. Despite the recommendation of the staff of the Planning Commission to approve Evergreen I subject to certain conditions, including downgrading the dwelling unit density (PX 12), the Albemarle County Board of Supervisors denied the special use permit application for the project on January 22, 1975 (DX 4).

After the defeat of Evergreen I, Moore continued as a public leader against development near his home on the reservoir. He spoke publicly at an August 1975 Board of Supervisors meeting in support of conservation zoning (1 dwelling unit per 5 acres) along the reservoir (Tr. 79). According to Moore, he "was speaking out for and urging that conservation zoning be put in this new planning, the whole way around the reservoir to protect it" (Tr. 80).

In November 1975, Fleming submitted new plans for a planned unit development, Evergreen II (Tr. 80).

Density, the major impediment to the approval of Evergreen I, was no longer a problem. Fleming planned Evergreen II for 2.46 dwelling units per acre—within the Planning Commission staff's recommended density level and within the level specified in the County's Comprehensive Land Use Plan (PX 8).

Moore nevertheless continued to oppose Evergreen (Tr. 81). He attended four public meetings on Fleming's project: two held by the Planning Commission and two by the Board of Supervisors (Tr. 83). In describing his own role in opposition to Fleming's proposed development, Moore stated, "[I]f private citizens don't take positions on matters of public interest where would we be . . .? (Tr. 148).

Despite the opposition of Moore and others, the Planning Commission staff recommended approval of Evergreen II, again with certain conditions. One of those conditions was a 100-foot tree buffer between the Evergreen property and Shack Mountain (Tr. 81). Fleming saw the buffer condition as the work of Moore, especially since Moore had previously negotiated with Fleming for the purchase of a buffer that was strikingly similar, at least to Fleming, as the buffer that the Planning Commission required (Tr. 191-93).

Moore's opposition to Evergreen II was also successful. The Albemarle County Board of Supervisors denied approval of Evergreen II on January 28, 1976.

While he struggled through months of vehement opposition to Evergreen, Fleming saw that other properties close to his on the reservoir was being developed. He believed that white developers were sponsoring these developments with little public opposition and without the stringent conditions that were being imposed on Evergreen (Tr. 194). Although much of the stated opposition to Evergreen was based on potential pollution of the reservoir, Fleming did not believe that the developments sponsored by whites were facing the same opposition as Evergreen (Tr. 186, 194, 490).

Not only was Fleming faced with what he perceived as white opposition that was seemingly nonexistent for white developments, but his project also required the approval of virtually all-white boards of decision makers (Tr. 431). Fleming had designed Evergreen II to meet the objections raised against Evergreen I. Instead of facilitating approval, Fleming's compromises only led to new conditions, including the 100-foot tree buffer (Tr. 81). Fleming believed that the

white developers were not saddled with similar conditions, and he did not see Moore opposing those developers on the supposedly environmental pretext put forth against Evergreen. Rather than working with him, those on whom Fleming depended for approval of his plan seemed to be "conditioning" his project into oblivion (Tr. 490).[5]

Shortly before Fleming's development plans were denied for the second time, he placed a paid advertisement in the Charlottesville-Albemarle Tribune on January 8, 1976, and the same advertisement in the Cavalier Daily on January 15 and 16, 1976. The publication became the subject of the ensuing lawsuit (App. O).

Frustrated that his efforts to develop low and middle income housing were encountering stiff public opposition, while other developments were seemingly receiving little or no opposition, Fleming placed the advertisement, entitled

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5 Confronted with seemingly insurmountable opposition, Fleming finally abandoned his development plans and in 1980 dedicated the land upon which he had hoped to build Evergreen to the Nature Conservancy. The land is now a public park owned by the City of Charlottesville, Virginia, and open to persons of all races, creeds, and colors pursuant to a provision included at Fleming's insistence in the deed of dedication.

"Racism," to voice his opinion regarding the motivation of his opposition. The article elaborated Fleming's social and economic philosophy, and contained his opinion that the entire zoning controversy over his proposed development was a struggle between the "haves" and the "have-nots." Fleming analogized Moore's own estate with Jefferson's Monticello and contrasted what he perceived as Moore's beliefs with Jefferson's ideals. Part of the opinion contained Fleming's rhetorical statement that Moore "does not want any black people within his sight."

Moore sued Fleming for libel in the Circuit Court of Albemarle County, and in 1978 obtained a jury verdict. The Supreme Court of Virginia reversed that jury verdict and remanded for a new trial because of defective jury instructions (App. A; B).

Shortly before the second trial, Fleming moved to dismiss the action on the ground that his published opinion constituted protected political speech under the First Amendment to the United States Constitution. He also argued that the term "racism" was a subjective statement of opinion incapable of being proved either true or false. The motion was denied at a hearing held on October 7, 1982 (App. I).

At the second trial, held on October 21 and 22, 1982, Moore called Fleming as an adverse witness, and asked Fleming whether he really believed that Evergreen's opponents were, in fact, racially motivated. Fleming candidly responded, "I feel that a way then and I feel that a way today" (Tr. 194), a belief he restated during his testimony on at least six separate occasions (Tr. 182, 183, 197, 218, 234, 504). He asserted his conviction that the real ground for the opposition to Evergreen was "racism and not pollution" (Tr. 234) and that he felt his antagonists were "conspiring against me because I was black" (Tr. 194). He also explained that his opinion regarding the motivation of his opposition was well-grounded because he felt that a number of other developments sponsored by white developers in the reservoir area had encountered virtually no opposition (Tr. 194-97). Furthermore, Fleming stated, "I've never had a person to come to me and tell me he's racist to my face" (Tr. 201).

At the close of Moore's case, Fleming moved to strike the evidence on the grounds that there had been no proof of actual malice, that the word "racism" was not defamatory, and that, in the context of this public controversy,

Fleming's publication constituted a constitutionally privileged statement of opinion. The motion was denied (App. L). Fleming renewed his Motion at the close of all the evidence on essentially the same grounds, and it was again denied by the trial court (App. L).

During the argument on the jury instructions the trial court concluded as a matter of law that Moore was not a limited-purpose public figure (App. J), and granted Moore's instructions 9 and 10, which allowed the liability case to go to the jury on a theory of simple negligence rather than actual malice (App. M). Fleming contemporaneously objected to the ruling and to the instructions (Tr. 537-39).

After the jury returned its verdict, Fleming, raising the federal constitutional issues that he raises in this Petition for Writ of Certiorari, moved to set the verdict aside or, in the alternative, for a new trial (App. N). The Court denied both motions in a letter opinion dated April 21, 1983 (App. D).

Final judgment was awarded to Moore and entered on June 3, 1983 (App. E). Fleming noted his appeal to the Supreme Court of Virginia on June 30, 1983. The Supreme

Court of Virginia granted Fleming an appeal on four of his assignments of error (App. F). In the decision from which Fleming seeks a Writ of Certiorari, the Supreme Court of Virginia affirmed the compensatory and punitive liability verdicts against Fleming (App. G; H).

REASONS FOR GRANTING THE WRIT

This case presents four important questions of constitutional law receiving pronouncedly inconsistent treatment in the lower courts. The first question concerns the degree of constitutional protection to be accorded statements of opinion, capable of no forensic demonstration of truth or falsity, uttered during the heat of intense public debate, involving controversial issues affecting an entire community. The second issue concerns defining a "limited-purpose public figure" in the context of a local public controversy. The third concerns the proof required to establish clearly and convincingly the subjective state of mind necessary for a finding of New York Times actual malice. The fourth concerns whether all the black jurors may be struck in a civil case where race is at the core of the controversy.

ARGUMENT

In Bose Corp. v. Consumers Union, 104 S.Ct. 1949 (1984), this Court reaffirmed that an appellate court in a case raising First Amendment issues has an obligation to make an independent examination of the entire record in order to ensure that the judgment of the trial court does not constitute a forbidden intrusion on the exercise of free expression. 104 S.Ct. at 1958, 1965. The appellate court's obligation to make a searching inquiry of the entire record in such a case is necessary because "[t]he First Amendment presupposes that the freedom to speak one's mind is not only an aspect of individual liberty--and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." Id. at 1961. A thorough examination of the record before this Court will show that the judgment against Fleming constitutes an unconstitutional abridgment of his right to free speech.

I. FLEMING'S ADVERTISEMENT IS A CONSTITUTIONALLY PROTECTED EXPRESSION OF OPINION

Limitations on civil libel exist because of its dangerous potential to constrain and inhibit freedom of speech and the communication of ideas. The United States Supreme Court recognized the constitutional dimension of these limitations in New York Times Co. v. Sullivan, 376 U.S. 254 (1964), emphasizing that the First Amendment "was fashioned to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." Id. at 269.

The marketplace of ideas fostered and protected by the First Amendment necessarily includes expressions of opinion as well as statements of fact.[6] The United States Supreme Court reemphasized this protection in the landmark case of Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974). In that case, the Court, in dicta, announced for the first time an absolute constitutional privilege for expressions of opinion:

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6 The common law doctrine of fair comment allowed critics a qualified immunity from libel actions so that they could express freely their views on subjects of public interest. See Restatement of Torts § 606 (1938).

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Gertz v. Robert Welch, Inc., 418 U.S. at 339-340.[7] As the

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7 As noted by the District of Columbia Circuit Court in a recent en banc decision, Ollman v. Evans, 750 F.2d 970, 974 n.6 (D.C. Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3718 (February 28, 1985), this statement was clearly dicta, as the actual holding in Gertz was that private figures did not have to prove a false statement was made with actual malice in order to recover in a libel action. As the Ollman court pointed out, however, a majority of federal circuit courts have accepted the Gertz statement as controlling law. See McBride v. Merrell Dow and Pharmaceuticals, Inc., 717 F.2d 1460, 1464 & n.7 (D.C. Cir. 1983); Bose Corp. v. Consumers Union, Inc., 692 F.2d 189, 192-94 (1st Cir. 1982), aff'd on other grounds, 104 S. Ct. 1949 (1984); Mr. Chow of New York v. Ste. Jour Azur S. A., No. 84-7198, slip op. at 5-6 (2d Cir. March 28, 1985); Avins v. White, 627 F.2d 637, 642 (3d Cir.), cert. denied, 449 U.S. 982 (1980); Church of Scientology v. Cazares, 638 F.2d 1272, 1286 (5th Cir. 1981); Orr v. Argus-Press Co., 586 F.2d 1108, 1114 (6th Cir.), cert. denied, 440 U.S. 960 (1979); Lewis v. Time, Inc., 710 F.2d 549, 552-53 (9th Cir. 1983); Rinsley v. Brandt, 700 F.2d 1304, 1307 (10th Cir. 1983). See also National Foundation for Cancer Research, Inc. v. Council of Better Business Bureaus, Inc., 705 F.2d 98 (4th Cir.), cert. denied, 104 S. Ct. 108 (1983) (finding that statement that charity was not "spending a reasonable percentage income on program services" was constitutionally protected opinion on the authority of Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970)).

Indeed, the Gertz dictum was recently quoted with approval by this Court. See Bose Corp. v. Consumers Union, Inc., 104 S. Ct. 1949, 1961 (1984).

United States Court of Appeals for the District of Columbia recently noted, "Gertz's implicit command thus imposes upon both state and federal courts the duty as a matter of constitutional adjudication to distinguish facts from opinions in order to provide opinions with the requisite, absolute First Amendment protection." Ollman v. Evans, 750 F.2d 970, 975 (D.C. Cir. 1984), petition for cert. filed, 53 U.S.L.W. 3718 (February 28, 1985). This constitutional privilege is rooted in a "profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks. . . ." New York Times Co. v. Sullivan, 376 U.S. at 270.

Significantly, the First Amendment privilege established in Gertz is not limited solely to political matters. The privilege encompasses all matters of legitimate public debate, including governmental decisions on local zoning matters such as those involved in this case. Greenbelt Cooperative Publishing Association v. Bresler, 398 U.S. 6 (1970) (characterization of developer's tactics before city council to obtain zoning variances as "blackmail" held non-libelous opinion); Okun

v. Superior Court of Los Angeles County, 29 Cal. 3d 442, 175 Cal. Rptr. 157, 629 P.2d 1369, cert. denied sub nom., Maple Properties v. Superior Court of Los Angeles County, 454 U.S. 1099 (1981) (accusations in zoning controversy that developer and city council entered into "corrupt relationship" held non-libelous opinion).

This Court's task is to examine Fleming's allegedly libelous advertisement and to determine whether, in light of the public nature of the Evergreen controversy, the tone and internal context of the language in the advertisement and the public's perception of that language, the advertisement qualifies as protected opinion. The importance of this inquiry stems from the fact that the Gertz decision provided no guidance in identifying protected opinions, nor has the Court squarely addressed the issue since Gertz. Ollman, 750 F.2d at 975. Without this guidance, lower courts, like the trial court and Supreme Court of Virginia in this case, are failing to provide the constitutional protection that expressions of opinion are due.

Because most post-Gertz opinions agree that the distinction between fact and opinion is a matter of law,

courts attempting to parse the fine line between the two have endeavored to formulate methods to distinguish between them. The need for guidance from this Court as to the method for separating fact from opinion is graphically illustrated by the varied approaches utilized by the lower federal and state courts.[8] The authors of the Restatement (Second) of Torts have also developed their own standard.[9]

In a comprehensive decision rendered recently, the United States Court of Appeals for the District of Columbia

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8 See, e.g., Information Control Corp. v. Genesis One Computer Corp, 611 F.2d 781 (9th Cir. 1980) (a multi-factor test); Hotchner v. Castillo-Puche, 551 F.2d 910, 913 (2d Cir.), cert. denied sub.nom., Hotchner v. Doubleday & Co., 434 U.S. 834 (1977) (a single-factor test); Shiver v. Apalachee Publishing Co., 425 So. 2d 1173 (Fla. Dist. Ct. App. 1983) (a "judgment call" test).

9 The Restatement (Second) of Torts § 566 provides:

> A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis of the opinion.

See Restatement (Second) of Torts Appendix at 368-70 and Supp. at 271-84 for decisions which have employed the Restatement approach. See also Christie, Defamatory Opinions and the Restatement (Second) of Torts, 75 Mich. L. Rev. 1621 (1977). The Ollman court disapproved of the § 566 approach. See Ollman, 750 F.2d at 984-85.

decided that an accusation of "Marxism" was constitutionally protected opinion. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984). In so holding, the court provided much-needed clarification on what qualifies as constitutionally protected opinion by developing a four part test to aid in determining whether the average reader would view a statement as one of fact or one of opinion:

> First, we will analyze the common usage or meaning of the specific language of the challenged statement itself. Our analysis of the specific language under scrutiny will be aimed at determining whether the statement has a precise core of meaning for which a consensus of understanding exists or, conversely, whether the statement is indefinite and ambiguous. Readers are, in our judgment, considerably less likely to infer facts from an indefinite or ambiguous statement than one with a commonly understood meaning. Second, we will consider the statement's verifiability--is the statement capable of being objectively characterized as true or false? Insofar as a statement lacks a plausible method of verification, a reasonable reader will not believe that the statement has specific factual content. And, in the setting of litigation, the trier of fact obliged in a defamation action to assess the truth of an unverifiable statement will have considerable difficulty returning a verdict based upon anything but speculation. Third, moving from the challenged language itself, we will consider the full context of the statement--the entire article or column, for

> example--inasmuch as other, unchallenged language surrounding the allegedly defamatory statement will influence the average reader's readiness to infer that a particular statement has factual content. Finally, we will consider the broader context or setting in which the statement appears. Different types of writing have, as we shall more fully see, widely varying social conventions which signal to the reader the likelihood of a statement's being either fact or opinion.

Id. at 979 (citations omitted). The court in Ollman also emphasized the importance of looking at the "totality of circumstances" in which the allegedly libelous statement appeared:

> [W]e are reminded by Gertz itself of our duty "to assure to the freedoms of speech and press that 'breathing space' essential to their fruitful exercise." For the contraction of liberty's "breathing space" can only mean inhibition of the scope of public discussion on matters of general interest and concern. The provision of breathing space counsels strongly against straining to squeeze factual content from a single sentence in a column that is otherwise clearly opinion.

Id. at 991-92 (citations omitted). Much like the term "Marxist" that was examined in Ollman, the term "racism" is commonly understood to be a term that is "hopelessly imprecise and indefinite." When examined in the context of the entire advertisement, viewed against the backdrop of the entire Evergreen controversy, Fleming's publication was no

more than an expression of opinion regarding the motivation of the opposition to his housing development.

Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), a pre-Gertz case bearing important similarities to this case, illustrates the broad rhetorical license permitted under the Constitution. In Greenbelt, a local real estate developer was engaged in negotiations with city council to obtain zoning variances that would allow him to construct a high-density residential development. Simultaneously, the city council was attempting to acquire land owned by the developer for construction of a high school. The concurrent negotiations gave rise to a heated local controversy and, in the course of the debate, the local newspaper ran two articles in which it repeated citizen characterizations of the developer's negotiations as "blackmail." The developer sued the newspaper for libel.

This Court, emphasizing that the news report containing the alleged libel described a matter of great local concern, held that "as a matter of constitutional law, the word 'blackmail' in these circumtances was not slander when spoken, and not libel when reported in the Greenbelt News

Review." 398 U.S. at 13. The Court's reasoning is directly applicable to this case:

> No reader could have thought that either the speakers at the meetings or the newspaper articles reporting their words were charging Bresler with the commission of a criminal offense. On the contrary, even the most careless reader must have perceived that the word was no more than rhetorical hyperbole, a vigorous epithet used by those who considered Bresler's negotiating position extremely unreasonable. Indeed, the record is completely devoid of evidence that anyone in the city of Greenbelt or anywhere else thought Bresler had been charged with a crime.

Id. at 14. Greenbelt, therefore, stands for the proposition that the use of epithets and rhetorical hyperbole in the context of a public controversy of significant local concern is not libelous. See also Old Dominion Branch No. 496, National Ass'n of Letter Carriers v. Austin, 418 U.S. 264 (1974) (union publication referring to named individuals as "scabs," "traitors," and as "lacking character" held non-libelous because mere hyperbole and used in a "loose, figurative sense").

In determining whether the use of the term "racism" was a constitutionally protected expression of opinion, this Court should examine the meaning attributed to the term by those who read the advertisement:

> The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express.

Restatement (Second) of Torts § 563 (1977). Comment b to this section is even more explicit. It states that "[a]lthough the person making the communication intends it to convey a defamatory meaning, there is no defamation if the recipient does not so understand it." Id. at comment b; see Rudin v. Dow Jones & Co., 557 F. Supp. 535, 543 (S.D.N.Y. 1983). Given the circumstances surrounding the Evergreen controversy, Fleming's use of the term "racism" could only be understood as a vigorous epithet criticizing Moore's opposition as unreasonable.

In this regard, the trial court erred in accepting Moore's argument that the term "racism" has a precise, readily definable meaning. The same argument regarding the term "fascist" was made and rejected in Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977). There, William F. Buckley, Jr., a noted syndicated columnist, brought a libel action against Franklin H. Littell for labeling him a "fascist" and a "fellow-traveler of fascism" in Littell's book, Wild Tongues. Buckley advanced an extremely narrow

definition of "fascism" in support of his claim, just as Moore here relies on a narrow definition of "racism." Buckley defined "fascism" as a twentieth century movement developed around Mussolini in Italy that organized society around certain corporate objectives that subordinated individual freedoms and democratic government to those objectives. Buckley v. Littell, 539 F.2d at 891 n.7. The trial court adopted Buckley's narrow definition of the term and, accordingly, found Littell's statements libelous.

The Second Circuit reversed the trial court's finding that the term was libelous. In doing so, it rejected the narrow, technical definition advanced by Buckley and adopted by the trial court:

> We find. . .that the use of "fascist," "fellow traveler" and "radical right" as political labels in Wild Tongues cannot be regarded as having been proved to be statements of fact, among other reasons, because of the tremendous imprecision of the meaning and usage of these terms in the realm of political debate, an imprecision which is simply echoed in the book.

Id. at 893.

The term "racism" is fraught with the same ambiguity and imprecision that color the term "fascism."[10] The

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10 See Note, Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of a Privilege, 34 Rutgers

(continued)

term is a philosophical description, lacking the degree of definitional clarity necessary to make a communication libelous. "Racism" has come to be invoked in political debate to support or oppose policies that have a disproportionate impact on certain racial groups. Affirmative action programs are often reported as examples of "racism" in the popular press. Political actions of city councils and state legislatures are regularly criticized by opponents, and reported in the press, as exemplifying "racism." In short, the word has evolved into a generalized term of opprobrium, used by persons of all races, to protest policies or practices with which they do not agree. As the Buckley case teaches, such terms are squarely within the realm of ideas and opinions that are constitutionally protected.[11]

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L. Rev. 81, 83 (1981) (terms like "fascist," "anti-semite," and "racist" are "evaluative opinions," and are matters of inference and judgment not susceptible explicit proof or disproof).

11 Similarly, other courts have cited Buckley and held it protected opinion to call a professor a "political Marxist," Ollman v. Evans, supra; to label an attorney an "old Stalinist," Brower v. New Republic, Inc., 7 Media L. Rep. (BNA) 1605 (N.Y. Sup. Ct. June 5, 1981); to charge a labor

(continued)

No one reading Fleming's published opinion could fail to appreciate that it was a polemical tract vigorously advocating the cause of his Evergreen project. It is an obvious exercise in persuasion by passion and rhetoric and cannot reasonably be mistaken for a disinterested appraisal of the factual aspects of Evergreen. In tone and content, from Fleming's metaphorical comparison of Monticello to Shack Mountain through his concluding opinion that many will benefit from Evergreen, the advertisement is clearly the work of a partisan advocate bent on persuading the public, and perhaps the Board of Supervisors, into the belief that Evergreen will succeed despite the forces aligned against it.[12]

(continued from previous page)

leader with "communism," National Ass'n of Government Employees v. Central Broadcasting Corp., 396 N.E.2d 996 (Mass. 1979), cert. denied, 446 U.S. 935 (1980); and to describe an organization as having "elements of Nazi-style anti-Semitism," Holy Spirit Ass'n for the Unification of World Christianity v. Sequoia Elsevier Publishing Co., 426 N.Y.S.2d 759 (N.Y. App. Div. 1980).

12 In this regard it is significant that Fleming's advertisement was published before and not after the Board of Supervisors' final vote on Evergreen II.

The advertisement also plainly addresses Fleming's perception of the public political issues of "growth versus no-growth," and the economic class conflict between the "haves and have-nots" in the community. These themes, along with that of public opposition to low-income housing, have been repeated in public controversies throughout the country over the past decade. Fleming's views on these topics, and his identification of Moore as an unreasonable opponent of Evergreen, are the very essence of an expression of opinion on a matter of public interest.

Fleming's opinion should be given the necessary "breathing space" required by this Court in Gertz. See Gertz, 418 U.S. at 342. It should not be repressed by those who seek to focus narrowly on the constituent parts of the opinion, rather than on its whole. Such a focus is myopic and serves to limit the freedom of speech guaranteed Fleming under the First Amendment.

II. MOORE WAS A PUBLIC FIGURE FOR THE PURPOSES OF THE EVERGREEN ZONING CONTROVERSY

The trial court ruled as a matter of law that Moore was not a public figure for the purposes of the

controversy surrounding Evergreen (App. J). The trial court's ruling on this issue allowed Moore to recover compensatory damages merely by showing simple negligence, without proof of actual malice.[13] See Curtis Publishing Co. v. Butts, 388 U.S. 130, 155 (1967); New York Times Co. v. Sullivan, 376 U.S. 254, 279-80 (1964).

This Court has defined a "public figure" as one who has obtained such pervasive fame and notoriety as to be a public figure for all purposes, or alternatively, and more commonly, one who has "thrust [himself] to the forefront of particular public controversies in order to influence the resolution of the issues involved." Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974) (emphasis added). The "limited-purpose public figure" mentioned in Gertz must meet two

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13 In awarding punitive damages, the jury did conclude that Moore proved that Fleming acted with actual malice. The Supreme Court of Virginia affirmed this finding of punitive liability (App. G; H). As Petitioner demonstrates in the next section of this Petition, however, Moore's evidence fell far short of establishing the New York Times actual malice that a public-figure plaintiff must clearly and convincingly prove before recovering compensatory damages, or that any plaintiff must prove before recovering punitive damages. Thus, instructing the jury that it could assess compensatory liability on a finding of negligence was reversible error.

requirements. First, he must be involved in a "public controversy," and second, he must inject himself voluntarily and purposefully into the nucleus of this controversy.

The lower court cases which have struggled to apply Gertz's definition are "[t]o be frank . . . in profound disarray." Harris v. Tomczak, 94 F.R.D. 687, 692 (E.D.Cal. 1982).[14] In this case, the trial court clearly failed to understand either aspect of the constitutional test for determining a public figure when it held that Moore was not a public figure in the context of the lengthy public debate surrounding Evergreen I and II. Therefore, this case presents an opportunity to correct the specific errors committed by the trial court and to give guidance to the lower courts in making public figure determinations.

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14 See also Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U. Pa. L. Rev. 1, 30 n.147, 34 n.162 (1983) (noting that Gertz is being inconsistently applied by lower courts); Note, Defining a Public Controversy in the Constitutional Law of Defamation, 69 Va. L. Rev. 931, 944 & n. 78 (1983) (noting that courts are having extreme difficulty in defining what constitutes a public controversy).

A. The Evergreen Zoning Struggle Was A Public Controversy

In Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), this Court held that a vigorous local zoning controversy involving matters critical to local self-government amounted to a public controversy. Id. at 7-11. This holding is consistent with the most comprehensive definition offered by a lower court for determining when a public controversy exists: "If the issue was being debated publicly and it had foreseeable and substantial ramifications for non-participants, it was a public controversy." Waldbaum v. Fairchild Publications, 627 F.2d 1287, 1297 (D.C. Cir.), cert. denied, 449 U.S. 898 (1980).

Moore involved himself vigorously in the public debate regarding housing development. This issue had substantial ramifications for present and future residents of the Rivanna Reservoir area. As such, the debate concerned issues having a substantial effect upon persons other than the immediate protagonists at the numerous public meetings, and should therefore be classified as a matter of legitimate public controversy in accordance with the Bresler-Waldbaum line of

reasoning. In fact, Moore admitted that the development controversy was a matter of "public interest" (Tr. 147-48), and that his opposition to that development was for "the good of his neighbors and the county as a whole" (Tr. 66-67; PX 4).

B. Moore Was A "Limited-Purpose Public Figure" For The Purposes Of The Public Controversy Surrounding Evergreen

Most courts attempting to apply the definition of "public figure" offered in Gertz have resorted to a nebulous "I know it when I see it" test. See, e.g., Rosanova v. Playboy Enterprises, Inc., 580 F.2d 859, 861 (5th Cir. 1978). This is because "the public figure concept has eluded a truly working definition." Id.

In his concurrence in Wolston v. Reader's Digest Ass'n, 443 U.S. 157 (1979), Justice Blackmun, while agreeing that Wolston was not a public figure, commented that the Court seemed to hold "that a person becomes a limited-issue public figure only if he literally or figuratively 'mounts a rostrum' to advocate a particular view." 443 U.S. at 169 (Blackmun, J., concurring) (emphasis added). Although Justice Blackmun criticized this development, later decisions have

relied on his language and attempted to limit the definition of "limited-purpose" or "vortex" public figures to those persons who have actually mounted the rostrum to give vent to their concerns for the common weal. See, e.g., Harris v. Tomczak, 94 F.R.D. at 704.

In this case Moore mounted the rostrum, both literally and figuratively, to give strident voice to his opposition to the Evergreen development. The evidence established that Moore shadowed Fleming at every turn by appearing in person or through counsel at every substantive public meeting at which the Evergreen project was considered. Moore was no idle bystander on these occasions. He or his surrogates spoke publicly at five of the eight hearings held by the Albemarle County Board of Supervisors and the Planning Commission. Moreover, he spoke at the August 1975 Board of Supervisors meeting in support of conservation zoning along the reservoir. Although that meeting was not specifically concerned with Evergreen, it was clearly part and parcel of the efforts of Moore and others to block development along the reservoir, specifically Evergreen. In short, Moore was a determined adversary who opposed Evergreen with every means at his disposal."

Moore openly and publicly opposed Evergreen, not only to protect the value of his own property, but also to voice his concern about pollution in the reservoir (Tr. 64, 77, 79-80). He admitted at trial that his public involvement was purely voluntary, actuated by his own desire to promote what he perceived to be the best interests of his neighbors and the county as a whole (Tr. 66-67; PX 4). Moore injected himself not merely into the periphery, but to the very forefront of this particular local zoning controversy. Moore's own witnesses saw him as one of the most prominent leaders in the opposition to Evergreen (Tr. 289, 442).

The Circuit Court of Albemarle County, therefore, erred in ruling that Moore was a private individual rather than a public figure for the purposes of the Evergreen controversy. This error fatally tainted the court's instructions 9 and 10 which did not require Moore to prove New York Times actual malice clearly and convincingly in order to recover. By allowing Moore to recover on a theory of simple negligence, the Circuit Court unconstitutionally constricted the "breathing space" that Fleming's First Amendment freedom to comment uninhibitedly upon a public figure's role in a heated local

controversy affirmatively requires. See New York Times Co., 376 U.S. at 270-72. If allowed to stand, the Circuit Court's judgment would sanction and encourage "self-censorship" of political speech, and restrict dramatically the scope of public debate that this Court has repeatedly maintained must be uninhibited, robust, and wide-open.

III. MOORE FAILED TO ESTABLISH CLEARLY AND CONVINCINGLY THAT FLEMING KNEW THAT HIS PUBLISHED OPINION WAS FALSE, OR THAT FLEMING HAD A RECKLESS DISREGARD FOR WHETHER OR NOT HIS PUBLISHED OPINION WAS TRUE

In assessing punitive liability against Fleming, the jury at the trial of this matter concluded that Fleming acted with actual malice in placing the advertisement embodying his opinion regarding the motivation of the opposition to the proposed Evergreen development. The Supreme Court of Virginia affirmed that finding of actual malice (App. G; H).

In its review of the jury's decision, the Supreme Court of Virginia properly recognized that it had a duty to make "an independent examination of the record . . . to be certain that the judgment . . . does not constitute a forbidden intrusion on the field of free expression" (App. G at

G-43). See Bose Corp. v. Consumers Union, 104 S. Ct. 1949, 1965 (1984). The Supreme Court of Virginia, however, stated that it would evaluate the actual malice evidence "from an objective standpoint, not merely from a subjective perspective" (App. G at G-44). The refusal of the Supreme Court of Virginia to evaluate the actual malice evidence only from a "subjective perspective" violates the constitutional mandate announced by this Court in New York Times and its progeny that the First Amendment requires that actual malice be evaluated subjectively, not objectively. Moreover, that failure by the Supreme Court of Virginia, and its resulting affirmance of the finding of punitive liability, constitute an unconstitutional infringement of Fleming's First Amendment right of free speech.[15]

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15 Should the Court agree to review the decision of the trial court holding that Moore was not a limited-purpose public figure for purposes of the Evergreen controversy, the discussion in this section of the Petition regarding the lack of evidence of actual malice is applicable in establishing why the trial court committed reversible error in allowing the jury to find compensatory liability upon a simple negligence standard of proof. If Moore was a limited-purpose public figure, he could establish compensatory liability only after proving actual malice. As this section of the Petition establishes, he failed to meet that burden of proof.

To establish actual malice, Moore had to prove with clear and convincing evidence that Fleming knew that what was stated in the published opinion was false, or that Fleming published his opinion with reckless disregard for whether or not its contents were true. New York Times Co. v. Sullivan, 376 U.S. at 285-86. This standard of proof has properly evolved into one of the strictest burdens of proof that a plaintiff must satisfy. A burden of proof less strict would abridge the unalienable right of free speech itself. See Herbert v. Lando, 441 U.S. 153, 159-60 (1979).

To determine whether actual malice existed in this case, the jury's inquiry should have focused on Fleming's state of mind. Id. at 156-57, 161, 165. To find actual malice, the jury would have had to conclude that Fleming actually entertained a high degree of awareness of the probable falsity of his advertisement. Garrison v. Louisiana, 379 U.S. 64, 74 (1964). As this Court stated in St. Amant v. Thompson:

> [R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing. There must be sufficient [clear and convincing] evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication.

390 U.S. 727, 731 (1968) (emphasis added). This Court's review of the entire record will show that Moore's proof of actual malice fell far short of that necessary to support the lower courts' finding of actual malice.

There was a complete absence of evidence that Fleming had any question, much less serious doubt, as to the truth of his opinion. On the contrary, he was unswerving in his belief that his Evergreen opposition, selectively opposing his project while seemingly ignoring those of white developers, was racially motivated:

> Q. All right, Mr. Fleming. Mr. Fleming, did you feel that the groups that showed up to oppose the first Evergreen plan on conservation or environmental grounds were conspiring against you because you were black?
>
> A. I feel that a way then and I feel that a way today, that they was conspiring against me because I was black. And I had good reason to feel that a way . . .

(Tr. 194);

> Q. So the fact that these other projects were approved, proves that there was race at work against you?
>
> A. That's my contention yesterday and today.

(Tr. 197);

Q. Is it your contention that the opposition to your plan on historic, architectural grounds, was a sham?

A. Yes.

Q. It was really race that was motivating him?

A. Yes.

Q. All right. Prior to the publication of your ad what act or what words did Mr. Moore do that indicated to you that he believed in racism and he was using race against you?

A. Because he did not oppose the white development on the reservoir and only opposed mine as being black.

(Tr. 218-19);

Q. And that was Evergreen II?

A. That was Evergreen II, but between Evergreen I and Evergreen II, preliminary plan, they started out Evergreen I with ten conditions, and it is very flustrating (sic) because everybody else, I look around me happen to be white, is getting their preliminary plan approved, and I'm black and, and you don't know just how flustrating (sic) a person can get being a black person and seeing that the white can get what they want, so they added . . . it's always a hundred ways to say no, so they added from ten conditions, they added twenty conditions.

(Tr. 490);

Q. Did you believe what was in [the advertisement]?

A. I believed it to be true, 100 percent true.

Q. And why?

A. Because of actions and circumstances and facts, its actions and circumstances that I had been put under involving with Evergreen, with the Evergreen planning and development.

(Tr. 504). Nowhere in the record is there any evidence rebutting the unequivocal testimony establishing Fleming's sincere belief in the contents of his opinion.

In addition to failing to prove that Fleming entertained any doubt whatsoever regarding the truth of his opinion, Moore also failed to prove that Fleming exhibited the reckless disregard for the truth necessary for a finding of actual malice. The test is not whether a reasonable person would have published his opinion. The test is whether Fleming seriously questioned the truth of his opinion but nevertheless proceeded to publish it. Looking through Fleming's eyes at his world as it existed in January 1976, as this Court must do in evaluating the finding of actual malice, the only possible conclusion is that Fleming was not motivated by actual malice but by genuine frustration.

In the late 1960s, Fleming began the painstaking process of acquiring acreage suitable for development near the reservoir. As he patiently went about this process, he observed other development in the area and believed that no material opposition developed to this growth, all of which was initiated by white developers. But when Fleming announced his project, which happened to be for an integrated, lower middle class clientele, a bitter controversy erupted.

Fleming responded to this opposition with accommodation. He selected a lower development density, compared to other developments in the vicinity of the reservoir (Tr. 194, 488-89). When that did not succeed, and Evergreen I was rejected, Fleming reduced the planned density to 2.5 units per acre, a figure that was satisfactory to the Planning Commission and was said to be more palatable to the Board of Supervisors. In addition to lowering the density, Fleming attempted to address the alleged pollution objections as well by satisfying earlier objections relating to storm water run-off (DX 1).

While he was trying to appease his opposition and those that controlled the fate of his project, Fleming saw

that others were smoothly pursuing development plans. Two developments along the reservoir were approved just as Fleming introduced Evergreen II. To Fleming's knowledge, neither Moore nor the others who were publicly opposing Evergreen were doing anything to oppose the white developers.

Whether Fleming's published opinion was correct in an objective, factual sense is not the standard for determining whether actual malice existed. Fleming's opinion was indeed his sincere belief based on what he saw.[16]

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16 Moreover, Fleming's suspicions of racism were not as absurd as Moore will no doubt try to lead this Court to believe. James B. Dick, the County's zoning administrator effective July 1, 1976, was called as a witness at the trial of this matter. When Dick assumed his duties, Evergreen was still under consideration and Moore and others continued to oppose it. Asked whether he noticed anything unusual about the opposition, Mr. Dick replied:

> A. In the three years I served in, as the Zoning Administrator, I never had that sort of consternation that was going on. It was a lot of people involved, lot of shouting going on.
>
> . . .
>
> THE COURT: There's been no objection to that question. You may answer it.
>
> A. Yes, Your Honor. The only thing . . . that I heard about it is that several of the people were making a racial evaluation of Mr. Fleming's application.

(Tr. 464, 465, 467).

Fleming believed from past experience that no one would tell him to his face that their opposition to his project was racially motivated (Tr. 206). He was entitled to rely on circumstantial evidence indicating that his opposition might be racially motivated. Time, Inc. v. Pape, 401 U.S. 279, 290-91 (1971) (adoption of one of a number of possible rational, though mistaken, interpretations of an ambigious document held insufficient evidence of actual malice). All of the evidence he saw indicated such a motivation. The record does not contain a scintilla of evidence that Fleming in fact entertained any contrary belief or doubt. In sum, there was a complete absence of proof that Fleming acted with actual malice in publishing his opinion.

IV. MOORE'S STRIKING OF ALL BLACK JURORS VIOLATED, IN THE SPECIFIC CIRCUMSTANCES OF THIS CASE, FLEMING'S CONSTITUTIONAL RIGHT TO DUE PROCESS

The fact that Moore struck all the potential black jury members violates, in the specific circumstances of this case, Fleming's Fourteenth Amendment right to the due process of law. This was not an ordinary case of a land

dispute, or a contract dispute, or a personal injury dispute. It was a case where a black man was sued by a white man over the question of whether an expressed opinion of racism was defamatory to the white plaintiff.

Fleming does not urge a sweeping new principle of constitutional law that all juries must contain quotas of various population groups or even a fair cross-section of the community. He does not assert that a black defendant must always be tried by a jury with one or more blacks or a white defendant must be tried by a jury with one or more whites. Rather, Fleming urges that on the narrow facts of this case, where a white plaintiff sues a black defendant, and where the issue of race is at the core of the case, the plaintiff's deliberate striking of all black jurors denied him his right to due process.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Due process is a flexible concept that seeks to achieve

"fundamental fairness." It changes with the time, place, and circumstances. The Court has recently said the following about due process:

> "'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . Representing a profound attitude of fairness . . . 'due process' is compounded of history, reason, the past course of decisions, and stout confidence in the strength of the democratic faith which we profess. . . ."

Ingraham v. Wright, 430 U.S. 651, 675 (1977) (quoting Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162-63 (1951) (Frankfurter, J., concurring)). Examining the time, place, and circumstances of this case, the striking of all the black jurors denied Fleming the fundamental fairness that due process guarantees.

In the minds of many, issues of racial prejudice and conflict remain fundamental, unresolved problems in America. This fundamental social condition cannot be forgotten the moment a citizen is tapped to become a juror. Black and white jurors bring markedly different perspectives on race relations with them as they step into the jury box. Despite their best intentions, neither group can fully

appreciate the perspective of the other where the specific topic of the lawsuit they must judge is the validity of a charge of racial motivation, itself an inherently subjective and ambiguous issue. For this reason, there is substantial doubt whether a jury composed entirely of white or entirely of black citizens can bring to bear a balanced perspective on an issue where race is central.

Fleming's case illustrates the unfairness of an all white or all black jury sitting in a case where race is the central issue. Consider the issue of actual malice. To resolve that issue, the jury was required to step into Fleming's shoes and determine from his perspective whether he knew that Moore was not a racist or acted with reckless disregard as to whether that was so. The difficulties of white jurors to assume that posture are obvious.

This Court must also consider the grossly excessive compensatory and punitive awards returned by the jury in this case—awards overturned by the Supreme Court of Virginia. The compensatory award was described by the Supreme Court of Virginia as "so out of proportion to the damages sustained to suggest that it is not the product of a fair and impartial

decision" (App. G at G-40), and the punitive award was described by the same court as "destructive" and so large as to "on its face [indicate] prejudice or partiality (App. G at G-46, G-47). These awards were rendered in a race case presided over by a white judge, tried to an all white jury, rendered in favor of a white man represented by white counsel, against a black man represented by black counsel. The Supreme Court of Virginia failed to explain why the jury prejudice that caused reversal of the damage awards did not require reversal of the findings of liability. Nevertheless, those awards are evidence that the racial imbalance of the jury infected all aspects of this jury trial.

This Court has recently granted a writ of certiorari to decide whether the Constitution prevents a prosecutor from peremptorily striking all black jurors in a criminal case involving a black defendant. Batson v. Kentucky, 53 U.S.L.W. 3757 (April 22, 1985). Fleming asks that the Court extend the Batson review to its logical conclusion and decide whether all black jurors may be struck peremptorily in a civil case pitting white against black where race is the central issue between parties of different race. The decision below is evidence of the constitutional infirmity of this practice.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue.

Respectfully submitted,

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) To-Wit:
CITY OF RICHMOND)

D. Alan Rudlin, being first duly sworn, states that the foregoing **Petition For Writ of Certiorari** was deposited in the United States mail, with first-class postage prepaid, and properly addressed to the Clerk of the Supreme Court of the United States, and further states that to his knowledge that the mailing took place on the 2nd day of May, 1985, within the time permitted by the Rules of the Supreme Court for filing.

D. Alan Rudlin

Subscribed and sworn to before me this 2nd day of May, 1985.

My commission expires: 3/17/87.

Jane B. Wilkinson, Notary

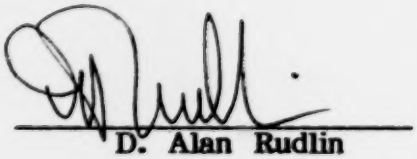
AFFIDAVIT OF SERVICE

STATE OF VIRGINIA)
) To-wit:
CITY OF RICHMOND)

D. Alan Rudlin, being first duly sworn, hereby states that on this 2nd day of May, 1985, he served counsel for Respondent with three (3) copies of the foregoing **Petition For Writ of Certiorari** by mailing the same, first-class postage prepaid, to counsel for Respondent at the following address:

Thomas E. Albro
Taggart, Gibson and Albro
P.O. Box 1585
Charlottesville, Virginia 22902

All parties required to be served have been served.



D. Alan Rudlin

Subscribed and sworn to before me this 2nd day of May, 1985.

My commission expires: 3/17/87.

Jane B. Wilkinson
Notary

84-1740

Office-Supreme Court, U.S.
FILED
MAY 2 1985
ALEXANDER L. STEVAS,
CLERK

No. _____

IN THE

UNITED STATES SUPREME COURT

OCTOBER TERM, 1984

JAMES N. FLEMING,

Petitioner,

v.

W. BEDFORD MOORE, III,

Respondent.

On Writ of Certiorari to the Supreme Court of Virginia

PETITION FOR WRIT OF CERTIORARI

APPENDIX

D. Alan Rudlin
Counsel of Record
W. Jeffery Edwards
Robert L. Brooke
HUNTON & WILLIAMS
P. O. Box 1535
Richmond, Virginia 23212
(804) 788-8200
Counsel for Petitioner

No. _____

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Counsel for Petitioner

APPENDIX A

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. _____

April 28, 1978

FINAL JUDGMENT ORDER

Plaintiff and Defendant, by counsel, came to be heard upon the following pleas and motions on the following dates: on November 30, 1977, on Defendant's Motion for Summary judgment; on December 2, 1977, on Plaintiff's Motion for Leave to Amend his Motion for Judgment previously filed herein, and Defendant's Motions for a Continuance and for leave to file additional pleadings; on December 6, 1977, on Defendant's Plea of the Statute of Limitations, Demurrer to Plaintiff's Amended Motion for Judgment, Amended Grounds of Defense and Plea of Justification, Motion for Continuance, Motion for Judgment by Default, and Motion for Summary Judgment; and were argued by counsel.

Upon consideration whereof, the Court ADJUDGED and ORDERED:

(1) On December 2, 1977, Defendant was granted leave to file additional pleadings and Defendant's Motion for Summary Judgment and Motion for a Continuance were overruled. On the same date, Plaintiff was granted leave to amend his Motion for Judgment by adding the

numbered paragraph (6) which had been filed with the Clerk, but only through and including the second line of the second page of said amendment ending with the sentence which concludes with the words "race or ethnic origin." Plaintiff's Motion for Leave to Amend his Motion for Judgment was denied as to the remainder of said numbered paragraph (6) which follows the sentence ending with the words "race or ethnic origin," to which ruling the Plaintiff objected and duly noted his objections.

(2) On December 6, 1977, Defendant's Plea of the Statute of Limitations, Demurrer to Plaintiff's Amended Motion for Judgment, Motion for Continuance, Motion for Judgment by Default, and Motion for Summary Judgment to Plaintiff's Amended Motion for Judgment were denied and overruled. On the same date, Defendant's Plea of Justification was struck in part and Defendant's Amended Grounds of Defense to Plaintiff's Amended Motion for Judgment were allowed through paragraph (4) thereof, and paragraphs (5) through (8) thereof were stricken.

On December 6, 1977, again the parties, by counsel, came and also a civil panel pursuant to the venire facias

heretofore issued. The venire was duly sworn and examined the Court. During the voir dire, Defendant moved for a mistrial, which motion was considered by the Court and overruled. Three members of the venire were excused for cause by the Court and replaced by three additional members who were duly sworn and examined. The venire was then found to be free of exception, whereupon, counsel for the Plaintiff and counsel for the Defendant jointly, alternately, struck three members from the panel, leaving seven veniremen who were thereupon duly sworn to well and truly try the issues joined between the parties and a true verdict to render according to the law and evidence.

After the opening statements of counsel and the presentation of Plaintiff's evidence, counsel for Defendant moved to strike the Plaintiff's evidence, which motion was argued by counsel, duly considered by the Court and overruled. To which ruling the Defendant objected and noted his exceptions. The Defendant then introduced his evidence and rested. Whereupon counsel for the Plaintiff moved to strike Defendant's evidence regarding his counterclaim. Defendant immediately took a nonsuit on his counterclaim before the Court ruled on Plaintiff's motion to strike.

One of the grounds advanced by the Defendant for his motion to strike was that the publication was not libelous per se and that plaintiff's evidence disclosed no proof of specific damages, which ground the Court duly noted, overruled and found that such publication was libelous per se, to which ruling the defendant duly objected and excepted. Likewise, in support of his objection to the instructions, defendant advanced the same ground, upon which the same rulings were made by the Court and the defendant duly noted his objections and exceptions.

Whereupon, the Court received proposed instructions from counsel for Plaintiff and counsel for Defendant, granted some, amended some, and refused some. Counsel were then given the opportunity to note their exceptions and objections with regard to the instructions. Thereupon, the Court instructed the jury and counsel made their closing arguments.

The jury retired from the courtroom to consider its verdict.

After due deliberation, the jury returned to the courtroom with the following written verdict:

> We, the Jury, find our verdict for the Plaintiff and award him for general damages, the sum of $10,000.00, and for punitive damages, the sum of $100,000.00.
>
> Kenneth C. Rogers, Foreman.

Whereupon, the Defendant moved to set aside the verdict of the jury and enter a final verdict for the Defendant or in the alternative, to set aside the verdict and award the Defendant a new trial. The Court set dates by which the parties should submit authority and argument with regard to Defendant's motion. On motion of the Defendant agreed to by Plaintiff, the Court subsequently allowed each party three additional days to submit his authority and argument. By agreement of counsel, the Defendant's motion was then submitted to the Court for its decision and after mature consideration, the Court was of the opinion that Defendant's motions should be and were in every respect denied, to which action of the court the Defendant objects.

On April 20, 1978, came the parties again by counsel and the court considered defendant's motion filed on April 19, 1978, for Reconsideration of Defendant's motion for

Summary Judgment, etc. After hearing argument of counsel and having duly considered the same the Court doth hereby deny said motion, to which defendant duly objects and excepts.

On the same date last mentioned came the parties by counsel to be heard upon defendant's motion for Remittitur. Upon evidence introduced by the Defendant in support thereof, to which evidence plaintiff objected, and upon the record in this case, and the same was argued by counsel. And the Court thereupon took said motion under advisement.

On the 28th day of April, 1978, came the parties again by counsel and the Court having reviewed portions of the trial transcript doth hereby deny said motion.

It is therefore ADJUDGED and ORDERED that the Plaintiff having judgment against the Defendant, James N. Fleming, in accordance with the aforesaid verdict of the jury in the sum of $110,000.00, plus costs, and interest from December 7, 1977.

And the said Defendant, by counsel, having indicated his intention to petition the Supreme Court of Virginia for an appeal, execution of this judgment is suspended until

the Supreme Court acts upon said petition for appeal, and the Defendant, if an appeal is sought, shall within 30 days post an appeal bond with provisions conditioned according to law in the penalty of Twenty Thousand Dollars ($20,000.00), with approved surety. And the transcript is hereby made a part of the record.

ENTER: /s/ David F. Berr

DATE: 4-28-78

Seen and objected to as
to the amount of bond

/s/ Thomas E. Albro

E. Gerald Tremblay
Thomas E. Albro
Trembly & Smith
105-109 E. High Street
Charlottesville, Virginia 22901
Counsel for Plaintiff

Seen and objected to for all reasons previously stated including failure of court to rule for defendant on motions for summary judgment, motion to strike, motion to set aside, etc.

/s/ Gerald G. Poindexter

Gerald G. Poindexter
Greene & Poindexter
304 West Cary Street
Richmond, Virginia 23220
Counsel for Defendant

Objected to for reasons previously stated

/s/ Charles Edward Carter

Charles Edward Carter
1790 Broadway
New York, New York 10019

APPENDIX B

JAMES N. FLEMING,

Appellant,

against

W. BEDFORD MOORE, III,

Appellee.

Record No. 781061

March 6, 1981

221 Va. 884, 275 S.E.2d 632

COCHRAN, J., delivered the opinion of the Court.

W. Bedford Moore, III, initiated this libel action against James N. Fleming in the court below. Final judgment was entered by the trial court on the jury verdict awarding Moore $10,000 in compensatory damages and $100,000 in punitive damages.[1]

Moore was a white, tenured, assistant professor in the Humanities Division of the School of Engineering at the University of Virginia during the 1975-76 academic year. His residence known as "Shack Mountain", located in Albemarle County, has architectural significance because of its Jeffersonian styling. The Moore land adjoined a tract known as "Evergreen", owned by Fleming and others and situated near the Rivanna Reservoir.

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1 During oral argument, a motion to dismiss for failure to remedy defects in the appeal bond was renewed. On February 21, 1979, when the appeal was awarded, bond was set by this Court at $120,000. On March 6, 1979, the Clerk of the Circuit Court certified that Fleming had appeared before her and given bond in the amount of $120,000 with approved surety. We therefore overrule the motion to dismiss. See Code § 8.01-676; Rule 5:31.

Fleming, a black real estate broker and developer, sought approval in the fall of 1974, first from the Planning Commission and then from the Board of Supervisors of Albemarle County, to have "Evergreen" rezoned from Agriculture to Residential Planned Unit Development. Upon rezoning, Fleming proposed to construct a planned unit development of high-density residential units for a predominantly black, lower-middle-income group of occupants.

The Planning Commission and Board of Supervisors held several meetings to consider Fleming's application and Moore spoke briefly during two of the meetings in opposition to the proposed development. Moore's position was that the project, if constructed, would create a pollution hazard to the Rivanna Reservoir, which supplies water to the City of Charlottesville, and that it would also detract from the value of his own property. Moore never gave interviews to the press concerning the planned development and never spoke about in public except at the two meetings. During the course of public debate over the proposed development, county planning officials advanced the idea that if Fleming's application for rezoning were to be approved, a tree buffer should

be required along the boundary line between the "Evergreen" and "Shack Mountain" properties. Moore felt that the buffer would be a good idea since it would screen his property from the "Evergreen" development. Fleming's plan was reviewed by the appropriate county agencies, the public was afforded an opportunity to comment on it, and his application for rezoning was subsequently denied by the Board of Supervisors in December, 1975.

In January, 1976, Fleming published in two newspapers a paid advertisement captioned "RACISM" in which Moore was identified by name. The advertisement appeared in the Charlottesville-Albemarle Tribune, a newspaper of general circulation in the community, on January 8, 1976, and in The Cavalier Daily, a university student newspaper, in its January 15 and 16, 1976, editions.[2]

---

2 The advertisement appeared in print as follows:

(Paid Advertisement)

RACISM

I have endeavored to realize the opportunity

(Footnote cont.)

(Footnote cont.)

to provide housing and pleasant surroundings for working people--the sort of people who made this the great country that it is.

I do not expect any Farmington members to buy my houses. The tenured position-holders who live off the public dole at the expense of the working people are already well-housed, and could not be expected to live in a racially-integrated neighborhood, anyhow.

There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monticello upon the hilltop overlooking the developing community we have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little Monticello does not want any black people within his sight.

There is a great conflict waging between the haves and the have-nots. Obviously we have created too much financial security for the tenured segment of the economic community whose greed is repeatedly shown by their expression of "I've got mine--too bad about you."

I am a lover of liberty and freedom of opportunity. I cannot stand by and see the have-nots oppressed by the no-growth people

(Footnote cont.)

Claiming that the article injured his reputation in the university community, Moore brought this action for libel.

[1] The first issue on appeal is whether the trial court erred in ruling, as a matter of law, that the article was defamatory per se and in submitting the issue of liability to the jury upon such a theory.[3] At trial, counsel for Fleming

---

(Footnote cont.)

> who are living off of our work. I know that this Country did not achieve the highest living standard in the world by no-growth or by oppression of the working man, and yet today the opportunity to improve one's living standard is being violently opposed by the same people who oppose my proposed neighborhood.
>
> Pollution of the reservoir is being used as the current excuse to foster no-growth. The solution, of course, is to remove the guaranteed incomes of these greedy people and put them in the position of seeing the world through the eyes of one seeking the opportunity to improve his or her living standard. Only then would they admit that the pollution excuse is a sham.
>
> I will develop Evergreen, and a lot of people will benefit from it.
>
> SIGNED: JAMES N. FLEMING

3 It is unclear from the record whether the jury was told that the article, if defamatory at all, was defamatory per se.

(Footnote cont.)

conceded that the trial court, rather than the jury, should determine whether the article was libelous per se, but he objected to the determination made by the court.

Unlike most states, Virginia makes no distinction between actions for libel and those for slander. Shupe v. Rose's Stores, 213 Va. 374, 375-76, 192 S.E.2d 766, 767 (1972); see Note, Defamation in Virginia--A Merger of Libel and Slander, 47 Va. L. Rev. 1116 (1961); W. Prosser, Torts § 112,

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(Footnote cont.)

The Appendix includes Instruction No. 8, which so provided, marked "given" by the trial court. Although the transcript records the reading to the jury by the trial court of all other Instructions marked "given", it fails to show that Instruction No. 8 was so read.

Assuming, however, that Instruction No. 8 was not given, we conclude that the trial court submitted the case to the jury upon a theory of per se defamation. Other instructions informed the jury that Moore was presumed to have suffered general damages, and that the absence of actual injury was to be considered only in diminution of damages. The presumption of damages is the critical distinction between defamation per se and other actions for defamation. See Shupe v. Rose's Stores, 213 Va. 374, 376, 192 S.E.2d 766, 767 (1972); Slaughter v. Valleydale Packers, 198 Va. 339, 346-48, 94 S.E.2d 260, 266 (1956). Since the jury instructions allowed the jury to presume damages, the case was presented to the jury on the theory of per se defamation even if Instruction No. 8 was not given.

at 763 n. 33 (4th ed. 1971). We have held that actions for libel are treated as actions for slander, and that the common-law rules of slander are applicable, so that alleged defamatory language is actionable according to the following principles:

> At common-law defamatory words which are actionable per se are:
>
> (1) Those which impute to a person the commission of some criminal offense involving moral turpitude, for which the party, if the charge is true, may be indicted and punished. (2) Those which impute that a person is infected with some contagious disease, where if the charge is true, it would exclude the party from society. (3) Those which impute to a person unfitness to perform the duties of an office or employment of profit, or want of integrity in the discharge of the duties of such an office or employment. (4) Those which prejudice such person in his or her profession or trade. All other defamatory words which, though not in themselves actionable, occasion a person special damages are actionable.

Shupe, 213 Va. at 376, 192 S.E.2d at 767, quoting Carwile v. Richmond Newspapers, 196 Va. 1, 7, 82 S.E.2d 588, 591 (1954).

Racism, of course, is neither a contagious disease nor a criminal offense for which a person may be indicted and punished. Thus, a finding of per se defamation in the present case could only be based upon the effect of the allegation upon the plaintiff's work. The trial court ruled, as a matter of law, that the allegation of racism prejudiced Moore in his profession.

To be actionable without proof of "special damages", we have held that the words must contain an imputation that is "necessarily hurtful" in its effect upon plaintiff's business and must affect him in his particular trade or occupation. James v. Haymes, 160 Va. 253, 261-62, 168 S.E. 333, 336 (1933). Accord, W. Prosser, Torts § 112, at 758 (4th ed. 1971) ("defamation of a kind incompatible with the proper conduct of the business, trade, profession or office itself"). There must be a nexus between the content of the defamatory statement and the skills or character required to carry out the particular occupation of the plaintiff. Restatement (Second) of Torts § 573, Comment e (1976). For example, because an attorney is required to adhere to the disciplinary rules, charging an attorney with unethical conduct is defamatory per se. Carwile, supra,

196 Va. at 8, 82 S.E.2d at 592. The words themselves must necessarily be damaging to the attorney in his profession.

Not every defamatory statement, however, is "necessarily hurtful" to a plaintiff's business and touches the plaintiff in his special trade or occupation. The allegation that a person has refused to pay a money debt is not per se defamatory if that person is not engaged in a vocation in which credit is necessary for the proper and effectual conduct of his business. M. Rosenberg & Sons v. Craft, 182 Va. 512, 519, 29 S.E.2d 375, 378 (1944). Accord, Weaver v. Finance Company, 200 Va. 572, 106 S.E.2d 620 (1959). Likewise, written notice that credit is being denied to a bookkeeper-secretary does not touch the plaintiff in her special trade or vocation. See Shupe, supra. That a defamatory statement may have had an adverse impact upon a plaintiff's work does not make that statement per se defamatory where the defamation is not "necessarily hurtful" to the plaintiff's business and does not touch the plaintiff in his special trade or occupation.[4]

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4 "Thus, a statement that a physician consorts with harlots is not actionable per se, although a charge that he

(Footnote cont.)

Because libel actions in Virginia are governed by common-law rules applicable to slander actions, libel cases from other jurisdictions are not helpful.[5] There are analogous cases, however, holding that slanderous imputations of Communism do not touch the individual in his chosen profession. See, e.g., Kory v. International Telephone & Telegraph Corp., 444 F. Supp. 193, 196 (S.D.N.Y. 1978) (allegation that journalist, a former ambassador, was a Communist held not to be slanderous per se); Gurtler v. Union Parts Mfg. Co., 1 N.Y.2d 5, 150 N.Y.S.2d 4, 132 N.E.2d 889 (1956) (allegation that an engineer was a Communist held not to be slanderous per se).

(Footnote cont.)

makes improper advances to his patients is actionable." The former statement does not necessarily affect his reputation as a physician but the latter directly affects it. Restatement (Second) of Torts § 573, Comment e (1976).

5 Although Annot., 33 A.L.R.2d 1196, § 15 (1954 & Later Case Service) details many cases concerning allegations of racial intolerance, most of the cases concern libelous, not slanderous, statements. In most jurisdictions, libelous statements are actionable without special damages even though they do not touch the plaintiff in his particular trade or vocation. As we have already noted, Virginia does not distinguish between slander and libel actions.

[3] In the present case, Fleming charged Moore with not wanting blacks to reside within sight of his home, but the allegation of racism was not made in the context of Moore's employment as a teacher.[6] We conclude that, while the allegation might have adversely affected Moore's work, the statements did not necessarily affect him in his particular profession and consequently were not defamatory per se. We hold, therefore, that the trial court erred in ruling that Fleming's advertisement was defamatory per se in that it necessarily was hurtful in its effect upon Moore's employment and adversely affected Moore in his capacity as a teacher. The consequence of this erroneous ruling, requiring reversal and remand for a new trial, was that the jury was allowed to presume general damages and also to award punitive damages based on the presumed damages.

Since this case must be remanded for a new trial, we will resolve other issues that otherwise may arise again upon retrial.

---

6 The advertisement did not allege, for example, that Moore discriminated against the black students in his classes.

[4] Fleming contends that Moore was a public figure and thus could not recover damages for defamation in the absence of a showing that the statement was made with "actual malice", that is, with "knowledge that it was false or with reckless disregard of whether it was false or not", as defined in New York Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

The Supreme Court in Gertz v. Robert Welch, Inc., 418 U.S. 323, 345 (1974), provided the following description of a public figure:

> For the most part those who attain this status [of public figure] have assumed roles of especial prominence in the affairs of society. Some occupy positions of such persuasive power and influence that they are deemed public figures for all purposes. More commonly, those classed as public figures have thrust themselves to the forefront of particular public controversies in order to influence the resolution of the issues involved. In either event, they invite attention and comment.

[5] Moore, a teacher at the University of Virginia, did not occupy a position of "such persuasive power and influence" that he could be deemed a public figure "for all purposes". Thus, we need only determine whether because of his activity relative to the "Evergreen" proposal he was a public figure for that limited purpose.

We do not believe that Moore's role in the public hearings concerning "Evergreen" merits his classification as a public figure. Gertz cautioned that a court must focus upon the "nature and extent of an individual's participation in the particular controversy giving rise to the defamation". 418 U.S. at 352. The mere fact that Moore spoke twice in public hearings concerning the "Evergreen" proposal is not determinative since his use of the public forum substantially resulted from his desire to protect his private interests. In Time, Inc. v. Firestone, 424 U.S. 448 (1976), the Court held that resort to the judicial process in order to vindicate private rights did not make the plaintiff a public figure. This reasoning appears equally applicable here, where Moore resorted to an administrative body in order to protect the value of his own residence. Moreover, like the plaintiffs in Wolston v. Reader's Digest, Inc., 443 U.S. 157, 167 (1979), and Gertz, Moore never discussed the "Evergreen" proposal with the media. He did not attempt to organize or lead opposition to "Evergreen". Since Moore's involvement at the public hearings was in his capacity as an adjoining private landowner whose property might be affected by the proposed development, we

conclude that he was not a public figure. Therefore, he was not required to show, as a prerequisite to recovery of compensatory damages, that Fleming acted with malice that met the New York Times standard.

[6] Fleming further contends, however, that even if Moore was not a public figure, the trial court erred in allowing the jury to award punitive damages on the basis of common-law malice.[7] In Gertz, the Court condemned the awarding of either presumed or punitive damages, "at least when liability is not based on a showing of knowledge of falsity or reckless disregard for the truth".[8] 418 U.S. at 349. The award of damages without proof of "actual injury"[9] was

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7 The court instructed the jury in Instruction No. 9 that punitive damages could be awarded if the jury believed from a preponderance of the evidence that Fleming acted with "actual malice", that is, that he "was motivated by revenge, personal spite, ill will or a desire to injure the Plaintiff".

8 Since we have ruled that Moore may not recover presumed damages because the article was not libelous per se, we do not reach Fleming's contention that Gertz would prohibit the awarding of presumed damages without a showing of knowing falsity or reckless disregard for the truth.

9 The opinion noted that damages for "actual injury" are not limited to out-of-pocket loss, and that trial courts are

(Footnote cont.)

condemned as "invit[ing] juries to punish unpopular opinion rather than to compensate individuals for injury sustained by the publication of a false fact". Id. On the basis of Gertz, we vacated an award of punitive damages entered against a publisher where the award was based upon a finding of common-law malice, and held that it was necessary to show knowledge of falsity or reckless disregard for the truth by "clear and convincing evidence" before punitive damages could be awarded. Newspaper Publishing Corp. v. Burke, 216 Va. 800, 805, 224 S.E.2d 132, 136 (1976). Gertz, however, did not explicitly extend its rule to non-media defandants. Indeed, the Supreme Court has recently noted that it has not resolved whether the First Amendment requires application of the New York Times rule in cases involving non-media defendants. Hutchinson v. Proxmire, 443 U.S. 111, 133-34 n. 16 (1979).[10]

(Footnote cont.)

permitted to compensate for impairment of reputation and standing in the community, personal humiliation, and mental anguish and suffering. Awards must be supported by competent evidence, although it is not necessary that the evidence assign a dollar value to the injury. 418 U.S. at 350.

10 Lower courts are divided on whether the First Amendment protections provided media defendants in New York

(Footnote cont.)

Since Fleming is not a media defendant and Moore is not a public figure, Gertz does not control the present case. Nevertheless, we share the concern expressed in Gertz at the assessment by juries of punitive damages "in wholly unpredictable amounts bearing no necesssary relation to the actual harm caused". 418 U.S. at 350. Therefore, we hold that any instruction on punitive damages must be structured upon the same standard of proof of "actual malice", as defined in New York Times, applied in Gertz, and followed in

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(Footnote cont.)

Times and Gertz are applicable to non-media defendants. Several courts have refused to extend Gertz. Rowe v. Metz, 195 Colo. 424, 579 P.2d 83 (1978), rev'g 39 Colo. App. 20, 564 P.2d 425 (1977); Gengler v. Phelps, 92 N.M. 465, 589 P.2d 1056 (1978); Harley-Davidson Motorsports, Inc. v. Markley, 279 Or. 361, 568 P.2d 1359 (1977); Calero v. Del Chemical Corp., 68 Wis.2d 487, 228 N.W.2d 737 (1975). Other courts have refused to distinguish between the protections afforded media and non-media defendants. Bryan v. Brown, 339 So.2d 577, 583-84 (Ala. 1976), cert. denied, 431 U.S. 954 (1977); Millsaps v. Bankers Life Company, 35 Ill, App. 3d 735, 342 N.E.2d 329 (1976); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976), aff'g 27 Md. App. 53, 341 A.2d 856 (1975); Ryder Truck Rentals v. Latham, 593 S.W.2d 334 (Tex. Civ. App. 1979). See J. Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer, 61 Va. L. Rev. 1349, 1417 (1975), predicting extension by the Supreme Court of Gertz to defamation suits against non-media defendants where the defamatory falsehood was published by the press.

Burke, that is required in defamation actions against media defendants, i.e., clear and convincing proof of knowledge of falsity or reckless disregard for the truth.

[7] In conformity with the general rule in tort actions, no punitive damages may be awarded for slander or libel unless compensatory damages are awarded. As an exception to the rule it is generally held that in a slander or libel action, where the defamation is actionable per se, punitive damages alone may be awarded. We approved the rule and the exception in Burke, supra, 216 Va. at 805, 224 S.E.2d at 136. As the advertisement in the present case was not actionable per se, the exception is not applicable.

[8] Moore did not allege or prove that he suffered any monetary loss. He did allege, however, that he had been insulted, mortified, held up to ridicule, and humiliated by the statement. We conclude that in libel actions not based upon per se defamation, where knowing falsity or reckless disregard for the truth is not shown, the compensatory damages should be limited to the actual damages proved to have been sustained, but such damages should not necessarily be restricted to out-of-pocket loss. See fn. 10 supra. Therefore, we

hold that Moore is entitled to recover compensatory damages upon proof of actual injury, including such elements as damage to his reputation and standing in the community, embarrassment, humiliation, and mental suffering. "Special damages", which under the common-law rule must be shown as a prerequisite to recovery where the defamatory words are not actionable per se, are not to be limited to pecuniary loss. To the extent that language in Shupe may be construed to indicate that emotional upset and embarrassment cannot constitute "special damages", it is hereby modified.

For the reasons assigned, the judgment of the trial court will be reversed and the case remanded for a new trial consistent with the views herein expressed.

Reversed and remanded.

HARRISON, J., dissenting.

I find the jury's awards totalling $110,000 in this case to be shocking. It is inconceivable that a respected professor, as is Mr. Moore, could have been damaged in the University community or elsewhere by the "advertisement" which appeared at the behest of Mr. Fleming.

I attach little significance to the word "racism" which heads the advertisement. The words "racism" and "racist" are bandied about in our society with complete abandon. People of all races currently utilize these terms to voice their innumerable real and imagined grievances. Indeed, it would not be difficult to find a newspaper which contains a complaint by one party against another for some action allegedly grounded in "racism", or "reverse racism."

When we examine the advertisement inserted in the papers and strip therefrom Fleming's self-laudatory and hortatory language, we find that he takes a dim view of Farmington members and tenured professors and feels that without their financial security they would be more sympathetic to the "have nots." The advertisement then makes a comparison between Thomas Jefferson and Professor Moore in which the latter emerges "second best." Fleming attempts to make his point by stating that Jefferson located his slave quarters in sight of Monticello, whereas Moore does not want black people in his sight. This apparently refers to Moore's approval of the suggested location of a tree buffer or screen between his property and Fleming's proposed development.

The advertisement is in bad taste and is ill-mannered, short-tempered, and indiscreet. It is poorly conceived and intemperate diatribe by an irate, disappointed, and frustrated black real estate developer who believes that his white opponent in a rezoning matter is not as concerned with pollution as he is apprehensive over the prospect of a "predominantly black, lower-middle-income" development adjoining his property. However, this reaction by Fleming was predictable and could well have been anticipated by Professor Moore when he left the academic community and entered the realm of real estate development and the controversial arena of zoning. The language of the market place is not always restrained, reasonable, or temperate. It is often sharp and unfair, and sometimes raucous, biting, and cruel.

Although the indignation of Professor Moore is understandable we should not allow the publication involved here to be the predicate of an action for libel and an award of damages. I would enter final judgment for the defendant.

APPENDIX C

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff

v.

JAMES N. FLEMING,

Defendant

Law No. 976-L

October 21-22, 1982

Transcript page 608

MRS. HIRSCH: It is.

THE COURT: The verdict is in proper form. "We, the jury, upon the law and evidence find our verdict for the plaintiff, W. Bedford, III against the defendant and award him compensatory damages in the amount of one hundred thousand dollars ($100,000.00) and punitive damages in the amount of two hundred and fifty thousand dollars ($250,000.00), together with interest on the amount of two hundred and fifty thousand dollars ($250,000.00) at the rate of twelve (12) percent per year from January 16, 1976. Signed foreman." Is this your verdict ladies and gentlemen of the jury, so say you all?

(All jurors indicated in the affirmative)

THE COURT: Is there any motion that the jury be polled?

MR. CARTER: Yes, Your Honor.

THE COURT: All right, poll the jury. If this is your verdict as read by the court, you will answer yes.

(Jury polled at this time and all jurors indicated yes)

THE COURT: The polling indicates the verdict is the verdict of the jury. Ladies and gentlemen of the jury, the court thanks you for your participation in this case. We realize it has been a long and arduous experience for you but

APPENDIX D

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

April 21, 1983

April 21, 1983

Mr. Thomas E. Albro
Smith, Taggart, Gibson & Albro
Attorneys at Law
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Mr. Gerald G. Poindexter
Poindexter & Poindexter
Attorneys at Law
P. O. Box 766
Surry, Virginia 23883

Re: W. Bedford Moore, III
v.
James N. Fleming

Gentlemen:

The Court again takes the opportunity to thank counsel for their careful briefing and thoughtful arguments in this case.

A careful review of the Court's rulings on motions made and objections taken in the light of the arguments raised in your respective briefs leads us to the conclusion that the Court's rulings were proper. Our review of the Court's rulings on instructions finds those rulings proper, and further that the jury was properly instructed.

On the question as to whether or not the evidence supports the jury verdict, we conclude that it does. Evidence of damages as the Supreme Court has stated in the first trial of Moore v. Fleming should not necessarily be restricted to out-of-pocket loss. "...Moore is entitled to recover

compensatory damages upon proof of actual injury including such elements as damage to his reputation and standing in the community, embarrassment, humiliation, and mental suffering." We find that there is ample evidence of the elements of actual injury, when so defined.

In giving consideration to the implications of the size of the verdict and specifically whether or not remittitur should be allowed under the circumstances, we must consider whether or not the jury was laboring under a misconception of the law, or the evidence or whether there was some other error or mistake, or if the jury was motivated by prejudice or sympathy. In effect, we must consider whether or not the jury verdict was based on the evidence. Viewing the evidence in the light most favorable to the jury verdict, we have evidence of deliberate and highly inflammatory false statements interjected deliberately into a highly sensitive academic community where such charges were extremely damaging. Under all the circumstances as revealed by the evidence we cannot say that the jury verdict is unsupported.

We deny the motion to set aside the jury verdict and to grant a new trial. The jury is the conscience of the community. Apparently this was a jury that felt strongly about the curse of racism and wished to make a strong statement about the unjustified use of the epithet of racism.

We conclude that the Court should enter judgment on the verdict in the full amount of the award including the prescribed interest. We ask that Mr. Albro prepare the Order and circulate it for endorsement by counsel of record, before presentation to the Court.

Sincerely,

/s/F. W. Harkrader, Jr., Judge
F. W. Harkrader, Jr., Judge

FWHjr/bl

cc: Shelby Marshall, Clerk

APPENDIX E

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

June 3, 1983

V I R G I N I A :

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

W. BEDFORD MOORE, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	AT LAW NO. 976-L
	)	
JAMES N. FLEMING,	)	
	)	
Defendant.	)	

FINAL JUDGMENT ORDER

On October 21, 1982 came the parties, in person and by counsel, and also a civil panel pursuant to a venire facias heretofore issued. The venire was duly sworn and examined by the Court. One member of the venire was excused for cause by the Court and replaced by one additional member who was duly sworn and examined. Counsel for the Plaintiff and counsel for the Defendant each alternately struck three members from the panel, leaving seven veniremen. Defendant moved to dismiss the venire so constituted on the grounds that plaintiff struck the only two blacks on the venire

and that no blacks remained in the venire after such strikes, which motion was overruled by the Court.

After the opening statements of counsel and the presentation of Plaintiff's evidence, counsel for Defendant moved to strike the Plaintiff's evidence, which motion was argued by counsel, duly considered by the Court and overruled, to which ruling the Defendant objected and noted his exceptions. The Defendant then introduced his evidence and rested. Plaintiff introduced evidence in rebuttal and rested, whereupon Defendant renewed his motion to strike Plaintiff's evidence, which motion was overruled by the Court.

Whereupon, the Court received proposed instructions from counsel for Plaintiff and counsel and Defendant, granted some, amended some, and refused some. Counsel for the parties noted their exceptions and objections regarding the instructions. Thereupon, the Court instructed the jury and counsel made their closing arguments.

The jury retired from the courtroom to consider its verdict.

After due deliberation, the jury returned to the courtroom with the following written verdict:

> We, the jury, upon the law and the evidence, find our verdict for the plaintiff, W. Bedford Moore, III, against the defendant and award him compensatory damages in the amount of $100,000.00 and punitive damages in the amount of $250,000.00, together with interest on the amount of $250,000.00 at the rate of 12% per year from January 16, 1976.
>
> Mimi E. Hirsch, Foreman.

Whereupon, the Defendant orally moved the Court to set aside the verdict of the jury as contrary to the law and the evidence and enter judgment for the Defendant, which motion the Court denied with leave for Defendant to file a written motion to set aside the verdict or in the alternative for a new trial. Defendant thereafter filed a written Motion To Set Aside Verdict And Enter Judgment for Fleming Or, In the Alternative, For A New Trial together with supporting memoranda. Defendant, in turn, filed a Memorandum In Opposition To Motion To Set Aside Verdict For A New Trial. By letter dated February 25, 1983 the Court requested argument ore tenus from counsel for the parties limited to the question of whether the Court should order remittitur. After

consideration, the Court denied Defendant's written post-trial Motion to which action of the court the Defendant objects. The opinion of the Court is found in a letter to counsel dated April 21, 1983 which is made a part of the record.

It is ADJUDGED, ORDERED and DECREED that the Plaintiff have judgment against the Defendant, James N. Fleming, in accordance with the aforesaid verdict of the jury in the sum of Three Hundred Fifty Thousand Dollars ($350,000.00) and costs, and interest at the rate of twelve (12) percent per annum on the sum of Two Hundred Fifty Thousand Dollars ($250,000.00) from January 16, 1976.

It is FURTHER ADJUDGED, ORDERED AND DECREED that, pursuant to Rule 5:9, Rules of the Supreme Court of Virginia, the transcript of hearings ore tenus held on January 29, 1982. October 7, 1982 and March 28, 1983, and the transcript of the trial held on October 21 and 22, 1982, be and the same are hereby made part of the record in this case.

Defendant having indicated his intention to appeal this order to the Supreme Court and having moved the Court to suspend execution of the judgment entered herein, the

Court hereby ORDERS that execution of this judgment is suspended so long as Defendant timely prosecutes the appeal and thereafter so long as the matter is under consideration by the Supreme Court, provided however that Defendant or someone for him shall fine an appeal bond in the Office of the Clerk of this Court within thirty (30) days of the entry of this order, with surety approved by the Judge of this Court, in the penalty of two hundred fifty thousand Dollars ($250,000.00) reciting this judgment, and Defendant's intention to present a petition for appeal and the other conditions set forth in Section 8.01-676(A) of the Code of Virginia (1950), as amended.

ENTER:/s/F. W. Harkrader, Jr.

DATE: 6/3/83

I ask for this:

/s/Thomas E. Albro

Thomas E. Albro
Barrett E. Pope
Smith, Taggart, Gibson & Albro
105-109 E. High Street
Charlottesville, VA 22901

Counsel for plaintiff

Seen and objected to:

/s/L. B. Cann, III

D. Alan Rudlin
L. B. Cann, III
Hunton & Williams
P. O. Box 1535
Richmond, VA 23219

Gerald G. Poindexter
P. O. Box 766
Surry, VA 23883
Counsel for defendant

APPENDIX F

SUPREME COURT OF VIRGINIA

JAMES N. FLEMING,

Appellant,

-against-

W. BEDFORD MOORE, III,

Appellee.

Record No. 831446

June 7, 1984

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Thursday the 7th day of June, 1984

James N. Fleming, **Appellant,**

against **Record No. 831446**
Circuit Court No. 976-L

W. Bedford Moore, III, **Appellee.**

From the Circuit Court of Albemarle County

Upon the petition of James N. Fleming an appeal is awarded him from a judgment rendered by the Circuit Court of Albemarle County on the 3rd day of June, 1983, in a certain proceeding then therein depending, wherein W. Bedford Moore, III, was plaintiff and the petitioner was defendant.

And it appearing that an appeal bond in the penalty of $250,000, conditioned according to law, has heretofore been given in accordance with the provisions of section 8.01-676 of the Code, additional bond is required in the amount of $460,000.

This appeal, however, is limited to the consideration of assignments of error D, E, G and H which read as follows:

D The jury's award is so excessive that it indicates the jury was influenced by passion, prejudice or corruption, or misconceived or misconstrued the law or facts.

E The jury's award of prejudgment interest at the rate of 12% per annum is contrary to law because prejudgment interest is not allowable on punitive damages and, further, because 12% exceeds the maximum allowable rate of prejudgment interest.

G The trial court erred in refusing to instruct the jury that, in order to find Fleming liable for compensatory damages, it must find that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

H The trial court erred in refusing to strike plaintiff's evidence on punitive damages because there was insufficient evidence on which the jury could conclude that Fleming knew what he was publishing was false or had reckless disregard for whether or not it was true.

On further consideration whereof, it is ordered that the parts of the record to be printed or reproduced in the appendix are to be limited to those parts of the record germane to assignments of error No. D, E, G and H, and the briefs to be filed shall be limited to such discussion as is relevant to the assignments of error upon which this appeal is awarded.

The petition for appeal is refused as to the remaining assignments of error.

A Copy,

Teste:/s/ Allen L. Lucy

Clerk

Supreme Court of Virginia

James N. Fleming, **Appellant,**

against **Record No. 831446**
Circuit Court No. 976-L

W. Bedford Moore, III, **Appellee.**

From the Circuit Court of Albemarle County

CERTIFICATE

Pursuant to Rule 5:30 of the Rules of the Supreme Court of Virginia, I, Allen L. Lucy, Clerk of the said Court, do hereby certify that on June 7, 1984, an appeal was awarded from a judgment rendered by the court below on June 3, 1983, in the suit therein depending under the short style of **W. Bedford Moore, III** v. **James N. Fleming.**

Additional bond is required in the penalty of $460,000 in conformity with Code § 8.01-676.

This certificate, constituting the summons on appeal, was this day mailed to the court below and to

D. Alan Rudlin, P.O. Box 1535, Richmond, Virginia 23212

L. B. Cann, III, P.O. Box 1535, Richmond, Virginia 23212

W. Jeffery Edwards, P.O. Box 1535, Richmond, Virginia 23212

Gerald G. Poindexter, P.O. Box 766, Surry, Virginia 23883

Counsel for Appellant

Thomas E. Albro, 105-109 East High Street, P.O. Box 1585, Charlottesville, Virginia 22902

Barrett E. Pope, 105-109 East High Street, P.O. Box 1585, Charlottesville, Virginia 22902

Counsel for Appellee

Given under my hand this 8th day of June, 1984.

/s/ Allen L. Lucy
Clerk

APPENDIX G

JAMES N. FLEMING,

Appellant,

-against-

W. BEDFORD MOORE, III,

Appellee.

Record No. 831446

February 1, 1985

229 Va. 783

(Pages 783-804, 839-58)

In one opinion, we decide four libel appeals. The plaintiffs are private individuals, not public officials or public figures. Three of the appeals are based on suits against members of the print media. In the fourth appeal, the defendant is a private person. Judgments for compensatory damages have been entered against the defendant in each case. In two cases, the judgments include awards of punitive damages.

The dominant issue to be decided in each case is what standard of liability should govern an award of compensatory damages in a libel action in Virginia, given the developments in federal constitutional law on the subject of libel beginning with New York Times Co. v. Sullivan, 376 U.S. 254 (1964). Adjudication of this central question will spawn subsidiary issues common to all the suits. In addition, the awards of punitive damages generate issues common to those two cases. The common questions of law will be analyzed in the first sections of this opinion and, in succeeding sections, the issues peculiar to a specific case will be adjudicated in the section of the opinion devoted to such case.

I. The Dominant Issue

A. Virginia Background

In Virginia, as in other states, the law of defamation historically has protected a basic interest. The individual's right to personal security includes his uninterrupted entitlement to enjoyment of his reputation. Fuller v. Edwards, 180 Va. 191, 197, 22 S.E.2d 26, 29 (1942). "Society has a pervasive and strong interest in preventing and redressing attacks upon reputation. Rosenblatt v. Baer, 383 U.S. 75, 86 (1966).

Under the general framework of defamation law in Virginia prior to 1964, the beginning of a period when major aspects of libel law became federalized, the defamed private citizen had to prove only a false publication that included words which were either actionable per se according to certain fixed principles, or, if not defamatory per se, words which resulted in special damages to the party defamed. See M. Rosenberg & Sons v. Craft, 182 Va. 512, 518, 29 S.E.2d 375, 378 (1944). Upon such publication,[1] malice was inferred

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1 No publication is required in an action brought under the Virginia statute of insulting words, Code § 8.01-45. Davis v. Heflin, 130 Va. 169, 107 S.E. 673 (1921).

and damage to reputation was presumed. See Note, Defamation in Virginia - A Merger of Libel and Slander, 47 Va.L.Rev. 1116, 1117 (1961). And, unless the otherwise libelous statement was privileged or the defendant could establish its truth, Rosenberg v. Mason, 157 Va. 215, 228, 160 S.E. 190, 195 (1931), the publisher was liable for compensatory damages. Upon proof of common-law actual or express malice, the plaintiff was entitled to an award of punitive damages. James v. Haymes, 160 Va. 253, 263, 168 S.E. 333, 337 (1933).

Commencing in 1964, however, a series of decisions of the United States Supreme Court caused significant changes in the law of libel.

B. Pertinent Supreme Court Decisions

In New York Times Co. v. Sullivan, the Supreme Court determined for the first time the extent to which the constitutional protections of speech and press limit a state's power to award damages in a libel action brought by a public official against critics of his official conduct. 376 U.S. at 256. The Court decided that the rules of law applied by the Alabama state courts were constitutionally deficient for failure

to provide safeguards for freedom of speech and of the press that are required by the First and Fourteenth Amendments in a libel action brought by such a public official. Id. at 264. The Court held that "[t]he constitutional guarantees require . . . a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice' - that is, with knowledge that it was false or with reckless disregard of whether it was false or not." Id. at 279-80. In Garrison v. Louisiana, 379 U.S. 64 (1964), the Court applied the New York Times "actual malice" standard to state criminal libel statutes that imposed sanctions for criticism of official conduct of public officials.

In Curtis Publishing Co. v. Butts, 388 U.S. 130 (1966), the Court held "that a 'public figure' who is not a public official may . . . recover [compensatory and punitive] damages for a defamatory falsehood whose substance makes substantial danger to reputation apparent, on a showing of highly unreasonable conduct constituting an extreme departure from the standards of investigation and reporting ordinarily adhered to by responsible publishers." Id. at 155. In holding

that the standard had been met by the plaintiff in Butts, but not in the companion case of Associated Press v. Walker (decided in the same opinion), the Court rejected the defendant's contention that it could not be subjected to an assessment of punitive damages. Justice Harlan, writing for the majority, stated: "Where a publisher's departure from standards of press responsibility is severe enough to strip from him the constitutional protection our decision acknowledges, we think it entirely proper for the State to act not only for the protection of the individual injured but to safeguard all those similarly situated against like abuse." Id. at 161.

In St. Amant v. Thompson, 390 U.S. 727 (1968), the Court identified evidence that may be employed to establish New York Times "actual malice." The majority, through Justice White, noted that "evidence of either deliberate falsification or reckless publication 'despite the publisher's awareness of probable falsity' was essential to recovery by public officials in defamation actions." Id. at 731. The Court then listed certain acts which show the "recklessness" aspect of "actual malice": intentional fabrication by a defendant of facts or communications; basing an article wholly upon an

unverified anonymous telephone call; printing allegations so inherently improbable that only a reckless person would put them in circulation; and publication of an article despite obvious reasons to doubt the truth and veracity of the informant upon whom the article relies for accuracy. Id. at 732. The Court said that failure to investigate will not in itself establish bad faith, id. at 733, but stated that a "defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true." Id. at 732.

In Rosenbloom v. Metromedia, Inc., 403 U.S. 29 (1971), a plurality of the Court, through Justice Brennan, extended the New York Times "actual malice" standard to publications relating to all matters of public or general concern, irrespective of the public or private nature of the plaintiff. In rejecting the suggested distinction between public officials and public figures on the one hand and private individuals on the other, Justice Brennan focused instead on society's interest in learning about issues of public or general concern. Thus, under Rosenbloom, once a trial court determined that the

alleged libel involved a matter of public or general concern, the fact finder should then consider whether New York Times malice had been proved, paying no heed to the plaintiff's status.

Three years later, in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), the Supreme Court expressly repudiated its holding in Rosenbloom. One commentator states that the Gertz majority sensed "the Rosenbloom plurality opinion had nearly destroyed the common law of defamation. . . ." J. Eaton, The American Law of Defamation Through Gertz v. Robert Welch, Inc., and Beyond: An Analytical Primer, 61 Va.L.Rev. 1349, 1409 (1975).

In Gertz, a Chicago policeman had shot and killed a youth. Gertz, a reputable attorney, was employed to represent the youth's family in civil litigation against the officer. The defendant published, in its monthly magazine giving the views of the John Birch Society, false statements about Gertz. The publication implied that Gertz had a criminal record and labeled him a "Leninist" and "Communist-fronter."

Justice Powell, writing for the majority, articulated several important holdings defining "the proper

accommodation between the law of defamation and the freedoms of speech and press protected by the First Amendment." 418 U.S. at 325. First, the Court reaffirmed its rulings in New York Times and Butts stating that public officials and public figures may recover for defamation only upon clear and convincing proof of New York Times malice. Second, the Court made clear that all persons, public or private, may recover presumed or punitive damages only upon clear and convincing proof of New York Times malice.

Third, and most important for purposes of the cases at bar, the Court held "that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual." Id. at 347. Justice Powell stated that this approach establishes an equitable boundary between the competing interests involved. "It recognizes the strength of the legitimate state interest in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media from the rigors of strict liability for defamation." Id. at 348.

The Court, however, expressly limited the applicability of a fault standard. Such limitation has not been sufficiently emphasized in many of the decisions and comments based on Gertz, but we think recognition of the limitation is essential to an accurate analysis of the decision. The Court said, quoting from Butts, the applicability of a fault standard must be restricted to circumstances where "the substance of the defamatory statement 'makes substantial danger to reputation apparent.'" Id. Continuing, the Court stated: "Our inquiry would involve considerations somewhat different from those discussed above if a State purported to condition civil liability on a factual misstatement whose content did not warn a reasonably prudent editor or broadcaster of its defamatory potential." Id.; Time, Inc. v. Firestone, 424 U.S. 448, 464-65 (1976) (Powell, J., concurring).

In addition, the Court said that the State's interest in compensating private individuals for injury to reputation extends no further than compensation for actual injury, which may include impairment of reputation and standing in the community, personal humiliation, mental anguish and suffering, as well as out-of-pocket loss. Gertz, 418 U.S. at 350.

Finally, the Court rejected the Rosenbloom plurality's requirement that judges must consider whether publications address issues of "general or public interest," stating that such a test "for determining the applicability of the New York Times standard to private defamation actions inadequately serves both of the competing values at stake." Id. at 346.

In Herbert v. Lando, 441 U.S. 153 (1979), the Supreme Court rejected a plea "that the balance struck in New York Times should now be modified to provide further protections for the press when sued for circulating erroneous information damaging to individual reputation." Id. at 169. The Court, through Justice White, noted that the 1964 New York Times decision which "was widely perceived as essentially protective of press freedoms," has been repeatedly affirmed in succeeding cases. Id. The Court also pointed out, however, citing Firestone and Gertz, that "the Court has reiterated its conviction--reflected in the laws of defamation of all of the States—that the individual's interest in his reputation is also a basic concern." Id.

C. Pertinent Virginia Decisions Since New York Times

Sanders v. Times-World Corp., 213 Va. 369, 192 S.E.2d 754 (1972), was decided after New York Times and Rosenbloom, but before Gertz. There, for the first time, we applied the New York Times malice standard to a libel case involving a private person arising from matters of "public or general concern," as required by Rosenbloom. "In Rosenbloom and Sanders, the relevant test was not the status of the plaintiff involved but rather the events which were the subject of the publication." Newspaper Publishing Corp. v. Burke, 216 Va. 800, 803, 224 S.E.2d 132, 135 (1976). In Sanders, we cited three earlier Virginia cases, from 1961, 1967, and 1970 respectively, for the proposition that, where defendants' statements were qualifiedly privileged, the plaintiff bears the burden to establish actual malice. The Sanders decision was based, nevertheless, on the federal standards of New York Times and Rosenbloom.

Newspaper Publishing Corp. v. Burke, supra, was the first libel case we decided after Gertz. Analyzing Gertz, we held that the trial court erroneously instructed the jury, in violation of the Gertz admonition, that the newspaper

defendant could be adjudged liable without fault to the private plaintiffs. Additionally, the Court determined that the trial court incorrectly told the jury that an award of punitive damages could be premised upon a finding of common-law malice rather than New York Times "actual malice."[2] Furthermore, while recognizing that we could define our own standard for recovery of actual, compensatory damages as authorized by Gertz, we chose not to formulate a Virginia standard in that case. We noted that the jury did not award actual damages, only punitive damages, and termed the task of fixing a Gertz-approved standard "unnecessary." 216 Va. at 804, 224 S.E.2d at 136.

In Fleming v. Moore, 221 Va. 884, 275 S.E.2d 632 (1981) (hereinafter Fleming I), a suit against a non-media defendant and the precursor to the instant case of the same name, we decided that the publication was not defamatory per se; that the plaintiff, a private individual, did not forfeit his

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2 For a definition of common-law malice, see also Preston v. Land, 220 Va. 118, 120-21, 255 S.E.2d 509, 511 (1979), a post-Gertz case of slander among private individuals in which the federal libel standards were not in issue.

private status by speaking at public hearings involving land use proposals; that because the plaintiff Moore was not a public figure, he was not required to show New York Times malice as a prerequisite to recovery of compensatory damages, id. at 892, 275 S.E.2d at 637; that punitive damages may not be awarded without a tandem award of compensatory damages, unless the libel involved was "actionable per se," id. at 893-94, 275 S.E.2d at 638; and, that in libel actions not based upon per se defamation where New York Times malice is not shown, compensatory damages must be limited to actual injuries sustained. We decided, however, that actual injury was not confined to pecuniary loss but included such elements as damage to reputation and standing in the community, embarrassment, humiliation, and mental suffering. We modified language contained in Shupe v. Rose's Stores, 213 Va. 374, 192 S.E.2d 766 (1972), to the extent that Shupe may have indicated that emotional upset and embarrassment cannot constitute "special damages." 221 Va. at 894, 275 S.E.2d at 639.

In Fleming I, we further decided that Gertz did not control because the Gertz rule was not explicitly extended to non-media defendants. We stated, nevertheless, that we

share the Gertz concern with the assessment by juries of punitive damages "'in wholly unpredictable amounts bearing no necessary relation to the actual harm caused.'" Id. at 893, 275 S.E.2d at 638, quoting Gertz, 418 U.S. at 350. Thus, we held in Fleming I, a suit by a private individual against a non-media defendant, that a recovery of punitive damages must be based upon the New York Times actual malice standard that is applicable to media defendants, that is, clear and convincing proof of knowledge of falsity or reckless disregard for the truth.

D. The Virginia Standard of Fault for Compensatory Damages

The parameters within which we must fix the Virginia standard as a matter of state law have been set forth in our prior discussion of Gertz. The plaintiffs in the present appeals argue for a negligence standard. Generally, the defendants assert that a defamed private individual should be required to establish New York Times malice to recover actual, compensatory damages in this State. In a brief amicus curiae filed in one of the media appeals, the Virginia Press Association, Inc., argues that "a negligence standard is

no standard at all" and that such a requirement "simply does not provide the protection needed to ensure a free and open press." Asserting that the matters involved in these four appeals involve issues of public concern, the defendants contend that our pre-Gertz Sanders decision is controlling and that liability for the alleged defamations requires proof of New York Times "actual malice." We do not agree.

The Supreme Court in Gertz left little doubt that it expected many of the states to adopt a negligence standard. Justice Powell, while noting that allowance of presumed damages would unnecessarily exacerbate the danger of media self-censorship, stated that the policy considerations concerning punitive-damage awards are "wholly irrelevant to the state interest that justifies a negligence standard for private defamation actions." 418 U.S. at 350. Justice Blackmun, concurring, flatly said "that the Court now conditions a libel action by a private person upon a showing of negligence, as contrasted with a showing of willful or reckless disregard. . . ." Id. at 353. Chief Justice Burger, dissenting, said that the majority "introduces the concept that the media will be liable for negligence in publishing defamatory statements with respect to

[ordinary private citizens]. Id. at 355. Justice Brennan, dissenting, forecast adoption of "a reasonable-care standard" by many states as the "probable result of today's decision." Id. at 366. Justice White, dissenting and deploring the "additional burden on the plaintiff of proving negligence or other fault," stated that "[u]nder the new rule the plaintiff can lose, not because the statement is true, but because it was not negligently made." Id. at 376.

Certainly, despite the Supreme Court's forecasts, we properly may choose to adopt as a matter of state law a stricter standard than ordinary negligence. We will not do so. Indeed, while we did not explicitly fix the standard in Fleming I, we implicitly indicated that a level of liability less than New York Times malice was all that was required. We said: "Therefore, [the plaintiff] was not required to show, as a prerequisite to recovery of compensatory damages, that Fleming acted with malice that met the New York Times standard." 221 Va. at 892, 275 S.E.2d at 638.

We hold, therefore, that in an action brought by a private individual to recover actual, compensatory damages for a defamatory publication, the plaintiff may recover upon

proof by a preponderance of the evidence that the publication was false, and that the defendant either knew it to be false, or believing it to be true, lacked reasonable grounds for such belief, or acted negligently in failing to ascertain the facts on which the publication was based. Under this standard, truth no longer is an affirmative defense to be established by the defendant. Instead, the plaintiff must prove falsity, because he is required to establish negligence with respect to such falsity. In addition, we hold that such liability may be based upon negligence, whether or not the publication in question relates to a matter of public or general concern.

The application of this negligence standard is expressly limited, however, to circumstances where the defamatory statement makes substantial danger to reputation apparent. The trial judge shall make such determination as a matter of law. If, on the other hand, no substantial danger to reputation is apparent from the statement in issue, New York Times malice must be established to recover compensatory damages.

Nothing in the public policy of the Commonwealth or in our prior decisions requires adoption of a standard

higher than one of ordinary negligence. The Constitution of Virginia does not mandate embracement of a more stringent standard. Article I, § 12 provides, in part, "that any citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right. . . ." That provision recognizes the balance to be struck between the right of free expression enjoyed by the individual and the press on the one hand and the right of defamed individuals to hold the speakers "responsible" for damage to reputation on the other. See I A. Howard, Commentaries on the Constitution of Virginia, at 249-59 (1974). And, as we already have said, our Sanders decision is not controlling, because it was decided before Gertz and was based on Rosenbloom, nor are any of our other cases.

Moreoever, we think that a negligence test strikes a proper balance between the rights of the news media and the rights of private individuals. As noted in Gertz, the private individual is more vulnerable to injury to reputation inflicted by defamatory falsehood than are public officials and public figures who ordinarily "enjoy significantly greater access to channels of effective communication and hence have a

more realistic opportunity to counteract false statements than private individuals normally enjoy." Gertz, 418 U.S. at 344. Even though "the truth rarely catches up with the lie," id. n.9, the opportunity for rebuttal is more readily available to the public person. Consequently, the state interest in protecting the private individual is greater than in the case of a non-private person.

In addition, we believe that the negligence standard will not result in self-censorship, as the media defendants argue, and that the duty of reasonable care is an acceptable burden for the press to bear. After all, the concept of negligence is fundamental to the imposition of tort liability in Virginia in the great majority of legal relationships that are created daily, and we have not been convinced that the publisher of the defamatory falsehood should be elevated to a preferred status for the assessment of liability for the harm caused by such a tort. Neither the intentional lie nor the negligent error substantially advances society's interest in uninhibited and robust debate. See id. at 340.

Also, the limitations we have placed on the rule will serve to insulate the publisher from liability based on a

publication the content of which does not warn a reasonably prudent editor or broadcaster of its defamatory potential. In such a case, New York Times malice must be established in order to recover compensatory damages. The mere negligent error or the careless misstatement of fact which, on its face, does not appear to be defamatory will not result in liability for compensatory damages being imposed on the publisher.

Finally, the standard we adopt today is in accord with the rule embraced by a substantial number of the states that have decided the issue since Gertz. See E. Collins and J Drushal, The Reaction of the State Courts to Gertz v. Robert Welch, Inc., 28 Case W.Res.L.Rev. 306 (1978). To date, at least 30 states and the District of Columbia have adopted a negligence standard in media cases involving private persons, either after discussing the issue or without discussing the question.[3] Also, two federal courts interpreting Virginia

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3 The cases that discuss the issue are: Peagler v. Phoenix Newspapers, Inc., 114 Ariz. 309, 560 P.2d 1216 (1977); Dodrill v. Arkansas Democrat Co., 265 Ark. 628, 590 S.W.2d 840 (1979), cert. denied, 444 U.S. 1076 (1980); Phillips v. Evening Star Newspaper Co., 424 A.2d 78 (D.C. 1980), cert. denied, 451 U.S. 989 (1981); Miami Herald Publishing Co. v. Ane, 423

(Footnote cont.)

law after Gertz anticipated that we would adopt a negligence standard. See General Products Co. v. Meredith Corp., 526 F.

(Footnote cont.)

So.2d 376 (Fla. App. 1982); Cahill v. Hawaiian Paradise Park Corp., 56 Hawaii 522, 543 P.2d 1356 (1975); Troman v. Wood, 62 Ill.2d 184, 340 N.E.2d 292 (1975); Gobin v. Globe Publishing Co., 216 Kan. 223, 531 P.2d 76 (1975); McCall v. Courier-Journal & Louisville Publishing Co., 623 S.W.2d 882 (Ky. 1981), cert. denied, 456 U.S. 975 (1982); Wilson v. Capital City Press, 315 So.2d 393 (La. Ct. App. 1975); Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688 (1976); Stone v. Essex County Newspapers, Inc., 367 Mass. 849, 330 N.E.2d 161 (1975); Madison v. Yunker, 180 Mont. 54, 589 P.2d 126 (1978); McCusker v. Valley News, 121 N.H. 258, 428 A.2d 493, cert. denied, 454 U.S. 1017 (1981); Marchiondo v. Brown, 98 N.M. 394, 649 P.2d 462 (1982); Thomas H. Maloney & Sons, Inc. v. E. W. Scripps Co., 43 Ohio App.2d 105, 334 N.E.2d 494 (1974), cert. denied, 423 U.S. 883 (1975); Martin v. Griffin Television, Inc., 549 P.2d 85 (Okla. 1976); Jones v. Sun Publishing Co., 278 S.C. 12, 292 S.E.2d 23, cert. denied, 459 U.S. 944 (1982); Memphis Publishing Co. v. Nichols, 569 S.W.2d 412 (Tenn. 1978); Foster v. Laredo Newspapers, Inc., 541 S.W.2d 809 (Tex. 1976), cert. denied, 429 U.S. 1123 (1977); Seegmiller v. KSL, Inc., 626 P.2d 968 (Utah 1981); Taskett v. King Broadcasting Co., 86 Wash.2d 439, 546 P.2d 81 (1976); Havalunch, Inc. v. Mazza, 294 S.E.2d 70 (W.Va. 1982); Denny v. Mertz, 106 Wis.2d 636, 318 N.W.2d 141, cert. denied, 459 U.S. 883 (1982).

The cases that do not discuss the issue are: Browning v. Birmingham News, 348 So.2d 455 (Ala. 1977); Corbett v. Register Publishing Co., 33 Conn. Supp. 4, 356 A.2d 472 (1975); Savannah News-Press Div. v. Whetsell, 149 Ga. App. 233, 254 S.E.2d 151 (1979); Bandelin v. Pietsch, 98 Idaho 337, 563 P.2d 395, cert. denied, 434 U.S. 891 (1977); Wheeler v. Green, 286 Or. 99, 593 P.2d 777 (1979); DeCarvalho v. DaSilva, 414 A.2d 806 (R.I. 1980); Colombo v. Times-Argus Ass'n, Inc., 135 Vt. 454, 380 A.2d 80 (1977); Adams v. Frontier Broadcasting Co., 555 P.2d 556 (Wyo. 1976).

Supp. 546 (E.D. Va. 1981); Mills v. Kingsport Times-News, 475 F. Supp. 1005 (W.D. Va. 1979). And the drafters of the Restatement responded to Gertz by adopting a negligence standard for the media defendant who defames a private person or a public person in a matter unrelated to his public capacity. Restatement (Second) of Torts § 580B (c) (1977). See generally R. Smolla, Let the Author Beware: The Rejuvenation of the American Law of Libel, 132 U.Pa.L.Rev. 1 (1983).

II. Subsidiary Issues

Because one of the present appeals involves a non-media defendant, the question arises whether the negligence standard is limited to media defendants, in which case the non-media defendant would remain subject to the rule of strict liability. Gertz involved a media defendant and the Court's opinion did not address the instant issue. We hold, however, as a matter of state law that the negligence standard should be applicable to media and non-media defendants alike.

The logic of such a conclusion is compelling. It would indeed be bizarre to hold as a matter of tort law that individuals are liable without fault while the medial is liable only upon a showing of negligence. See Jacron Sales Co. v. Sindorf, 276 Md. 580, 350 A.2d 688, 695 (1976). The media, being composed of professionals and capable of causing much greater damage because of wider distribution of the communication, are more cognizant of the risk of liability and more likely to take appropriate precautions. The private-individual defamer, however, whose utterance is likely to cause less harm, ordinarily will not realize the potential liability resulting from his communication and will fail to take similar precautions. See Restatement (Second) of Torts § 580B, comment e (1977). Contra Denny v. Mertz, 106 Wis.2d 636, 659-61, 318 N.W.2d 141, 152-53 (1982). Neither policy nor reason supports different treatment of the respective types of defendants. See Jacron Sales Co., 276 Md. at 593-94, 350 A.2d at 696.

Furthermore, in Fleming I, we applied the constitutional privilege of New York Times, Butts, and Gertz to a non-media defendant where recovery of punitive damages was sought. We now take the next logical, consistent step and

apply the Gertz-authorized negligence standard to non-media defendants where recovery of compensatory damages is sought.

Another subsidiary issue that arises from establishment of a negligence standard for compensatory damages is the current status of the common-law qualified privileges in Virginia. Unlike some jurisdictions, Virginia does not permit a qualified privilege to be defeated upon a showing of mere negligence. We require proof of common-law malice, that is, behavior actuated by motives of personal spite, or ill-will, independent of the occasion on which the communication was made. Story v. Newspapers, Inc., 202 Va. 588, 590, 118 S.E.2d 668, 670 (1961). This being a more stringent standard than negligence, the qualified privileges survive in Virginia. This means, of course, that the defendant may still avoid liability based on qualified privilege even though the negligence standard is met by the plaintiff. When a qualified privilege is established and not defeated by a plaintiff's evidence of common-law malice, the negligence standard is subsumed in the higher standard and it is of no consequence that the plaintiff might have met the lower standard of negligence. Jacron Sales Co., 276 Md. at 600, 350 A.2d at 699-700.

The other subsidiary issue involves the scope of appellate review in these cases. Relying on Bose Corp. v. Consumers Union of the United States, Inc., 104 S.Ct. 1949 (1984), the media defendants assert that, in a case raising First Amendment issues, an appellate court has an obligation to make an independent examination of the entire record in order to insure that the judgment of the trial court does not constitute a forbidden intrusion on the exercise of free expression. We agree that an appellate court in Virginia must conduct such independent examination of the whole record on the issue of punitive damages or where New York Times malice must be established, but not on the question of compensatory damages when New York Times malice need not be proven.

Bose primarily is concerned with the application of Rule 52(a), Federal Rules of Civil Procedure, which fixes a "clearly erroneous" standard for federal appellate review of findings of fact. Nevertheless, the Supreme Court in First Amendment cases arising in state courts repeatedly has held that the independent examination contended for is required on review. See, e.g., New York Times, 376 U.S. at 284-86; St.

Amant, 390 U.S. at 732-33. In Bose, the Court held: "The requirement of independent appellate review reiterated in New York Times v. Sullivan is a rule of federal constitutional law." 104 S.Ct. at 1965. Consequently, because we apply the federal constitutional rule of New York Times to the punitive-damage issue in a State defamation suit, we likewise apply the federal constitutional rule of independent appellate examination to such an issue.

Thus, we hold that an appellate court in Virginia, on the issue of punitive damages or where New York Times malice must be proven, must independently decide whether the evidence in the record on appeal is sufficient to support a finding of New York Times "actual malice" by clear and convincing proof. 104 S.Ct. at 1965. This does not mean that the reviewing court may disregard the determinations made on credibility of witnesses by the trier of fact or that the presumption of correctness that attaches to factual findings is to be discounted. Id. at 1959. The rule simply means that appellate judges in such a case must examine the facts pertinent to the punitive-damage award and exercise independent judgment to "determine whether the record establishes actual malice with convincing clarity." Id. at 1967.

In contrast, however, on the issue of compensatory damages in libel cases when New York Times malice need not be proven, we will continue to follow the established standard of review mandated by Code § 8.01-680, that is, "the judgment of the trial court shall not be set aside unless it appears from the evidence that such judgment is plainly wrong or without evidence to support it." The reason we do not embrace Bose on this issue is that the Bose mandate of independent examination is bottomed on the obligation of reviewing judges to assure that governing federal constitutional law has been applied properly. The negligence standard for compensatory damages that we have adopted is not a matter of governing federal constitutional law; rather, within the parameters authorized by Gertz, we have fixed the standard as a matter of state law. Accordingly Bose, as well as the federal decisions on which it is based, is not controlling on this issue.

VI. Fleming v. Moore

In January of 1977, appellee W. Bedford Moore, III, sued appellant James N. Fleming for libel arising from an advertisement published a year earlier in The Cavalier Daily, a student newspaper circulated on the campus of the University of Virginia and in the Albemarle County area. Fleming was a black real estate developer and Moore was a white University professor. The dispute, and resulting publication entitled "Racism," arose from efforts by Fleming, and others, to develop land in the vicinity of Moore's home situated in the County.

Following a 1977 trial, the court below entered judgment on a jury verdict awarding Moore $10,000 compensatory damages and $100,000 punitive damages. On appeal, we reversed the judgment and remanded the case for a new trial on all issues. The 1981 Fleming I decision has been summarized in section I(C) of this opinion.

The new trial was held in October of 1982 and resulted in a jury verdict in favor of the plaintiff for $100,000 compensatory damages and $250,000 punitive damages plus 12 per cent interest on $250,000 from January 16, 1976,

upon which the trial court entered judgment in June of 1983. We awarded the defendant another appeal, limited to questions concerning the standard of fault to be applied for recovery of compensatory damages, sufficiency of the evidence to support the punitive award, excessiveness of both awards, and the correctness of prejudgment interest on the punitive award. The evidence presented during the retrial differs to some degree from that produced at the first trial.

In the mid-1970s, Fleming, a County native and a successful realtor-appraiser, joined three white business associates in an effort to develop approximately 127 acres of land in the County for residential purposes. The site was within the immediate watershed of the Rivanna Reservoir, a source of drinking water. The planned unit development, called "Evergreen," was to house lower and middle-income families of both races. Moore, a resident of the Charlottesville area since 1947, was an assistant professor in the Humanities Division of the University's School of Engineering and Applied Science. Moore lived near the development site. His residence was named "Shack Mountain" and was described as a Twentieth Century reproduction of an Eighteenth Century

Jeffersonian pavilion; it was a "small version" of Monticello, not a "replica."

During a period of several years, defendant Fleming sought unsuccessfully to obtain a special permit from county authorities for use of the agriculturally zoned land. Plaintiff Moore and others opposed the development because of concern over the proposed high density (initially, 804 dwelling units were planned) and because of fear that the reservoir would be polluted.

A series of public hearings was held before the Planning Commission and the Board of Supervisors. The plaintiff and others spoke in opposition to the several plans that were submitted by the defendant. The Planning Commission staff recommended that the first Evergreen proposal be rejected mainly because the planned density was too great. At the time, pollution of the reservoir was also of considerable concern to the planners. The Planning Commission and the Board of Supervisors rejected defendant's first proposal, mainly because of the high density projection. The second plan for Evergreen, with a lower proposed density, was likewise turned down by the County because of conservation and environmental

factors relating to the reservoir. Eventually, the Board of Supervisors in early 1976 imposed a moratorium on construction within the reservoir watershed until a study in progress dealing with pollution of the reservoir could be completed. The jury has found on disputed facts that race was not a factor in any decisions made by County officials relating to Evergreen and that the plaintiff was not motivated by racial considerations in his opposition to defendant's development.

Nevertheless, as the land-use controversy developed, defendant thought that his plans were being frustrated solely on racial grounds. He noticed that white developers were obtaining approval of their plans while his were being denied. Also, he assumed that citizen groups opposing the development were conspiring against him because he was black. In addition, the planning staff had recommended a 100-foot tree buffer to separate the developed area from the Shack Mountain property. The defendant believed that the plaintiff was a leading opponent of Evergreen and that Moore was responsible for imposition of the condition requiring the buffer. Fleming thought Moore was attempting to have the buffer placed on Fleming's property and that Moore somehow would

take advantage of a racially restrictive covenant in prior deeds to the property.

Consequently, defendant drafted the publication in question. He arranged for it to appear as a paid advertisement in two January 1976 issues of The Cavalier Daily, a campus newspaper read by approximately 15,000 persons. The advertisement is copied verbatim in Fleming I, 221 Va. at 887-88 n.3, 275 S.E.2d at 634-35 n.3. It was headlined "RACISM" and "Signed: James N. Fleming."

After stating that the author had endeavored to provide pleasant housing for "working people," the item said:

> "I do not expect any Farmington members to buy my houses. The tenured position-holders who live off the public dole at the expense of the working people are already well-housed, and could not be expected to live in a racially-integrated neighborhood, anyhow.
>
> "There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monticello upon the hilltop overlooking the developing community we have a replica of Monticello upon

> the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little Monticello does not want any black people within his sight."

The advertisement then referred to a "great conflict" between the "haves and the have-nots" and stated that "we have created too much financial security for the tenured segment of the economic community whose greed is repeatedly shown by their expression of 'I've got mine — too bad about you'."

Continuing, the author wrote that he was a "lover of liberty" and could not stand by to "see the have-nots oppressed by the no-growth people who are living off of our work." He next stated:

> "I know that this Country did not achieve the highest living standard in the world by no-growth or by oppression of the working man, and yet today the opportunity to improve one's living standard is being violently opposed by the same people who oppose my proposed neighborhood.

> "Pollution of the reservoir is being used as the current excuse to foster no-growth. The solution, of course, is to remove the guaranteed incomes of these greedy people and put them in the position of seeing the world through the eyes of one seeking the opportunity to improve his or her living standard. Only then would they admit that the pollution excuse is a sham."

The advertisement concluded: "I will develop Evergreen, and a lot of people will benefit from it."

Relying on Bose Corp. v. Consumers Union of the United States, Inc., the defendant contends we should make an independent examination of all issues in this case to insure that the judgment below does not constitute a forbidden intrusion on the exercise of free expression. In addition, Fleming argues that the advertisement related to a matter of vital public concern, a land-use controversy, and that New York Times "actual malice" is the proper standard of liabiity for compensatory damages. We have addressed these issues already and no further discussion is necessary to explain our rejection of the contentions. The trial court was correct in

applying a negligence standard in this case, and in using the principle in a suit against a non-media defendant.

We will consider next the question whether the award of compensatory damages is excessive. The defendant argues that the award shocks the conscience in that it bears no relationship to the loss actually sustained by Moore.

Moore read the advertisement on both days it was published. In describing the effect of the publication, Moore testified that race had no bearing on his opposition to Evergreen. Rather, he was concerned about pollution of the reservoir, preserving his privacy, and protecting the historic character of his home, which had been placed on the national and state registers of historic places. Consequently, he testified, he was "very keenly" embarrassed and humiliated by the racial attack because he had been "brought up with sort of innocence on the whole subject." He stated that the publication made him conscious of race in a way he deplored because he had been taught to be "color blind" and "considerate" in his dealings with all other persons.

Moore testified: "I was seriously upset to have a man that I disagreed with in public meetings go around behind me and put into the University student newspaper such a malicious attack on me, my character. This was done in front of my colleagues at the University, students, black and white." Describing his concern that the item had been placed in the student newspaper as opposed to some other publication, Moore said: "It was very near home and concerned me very much indeed. I felt that he had put a gap in my honor that could only be restored by vindication of my fellow citizens on this jury."

The evidence showed that during 1975 and 1976, a number of racial concerns confronted the University. The school was trying to attract minority students and faculty. Tension had developed on campus because of the University President's membership in an exclusive private club, Farmington, and there were demands that he resign his office. The plaintiff proved that publication of the advertisement in the midst of this turmoil adversely affected his teaching and his relationship with his students of both races. Dr. Edgar F. Shannon, Jr., President of the University from 1959 to 1974,

testified that the perceived racial attitudes of a professor are important to his relations with his students and materially affect the atmosphere in the classroom. Shannon indicated that he had never known Moore to do or say anything degrading to black persons or the black race.

Testimony showed that Moore was "very upset" by the publication and felt he had experienced "a terrible wrong." The evidence showed that other faculty members at the University as well as students made repeated inquiries about Moore and whether the statements in the item were true.

Summarizing the damage he suffered, Moore testified, "It's not an experience I would visit on most people. It's very unhappy." Moore said the humiliation had not lessened with the passage of time: "It still stings. I still feel my honor has been questioned, that's not something you shrug off easily."

Ordinarily, damage awards fixed by a jury following a properly conducted trial and approved by the trial judge are "held to be inviolate against disturbance by the courts." Smithey v. Refining Company, 203 Va. 142, 145, 122 S.E.2d 872, 875 (1961). But, "[a] healthy administration of justice

requires that, in a proper case, the courts must take action to correct what plainly appears to be an unfair verdict. This authority is an ancient and accepted part of the common law." Id. at 146, 122 S.E.2d at 875. When there is a claim that the verdict is excessive and it appears that the award is so out of proportion to the damages sustained to suggest that it is not the product of a fair and impartial decision, it becomes the duty of the court to correct the injustice. Id., 122 S.E.2d at 875-76. This is such a case.

We agree with the defendant that the amount of the award bears no relationship to the loss actually sustained by the plaintiff. Clearly, Moore suffered damage to his reputation, embarrassment, humiliation, and mental suffering from this defamatory publication made negligently. Nevertheless, the verdict of $100,000 is so out of proportion to the damage sustained as to be excessive as a matter of law. As the defendant points out, Moore experienced no physical manifestation of any emotional distress. Moreoever, he sought no medical attention for any condition resulting from the publication. In addition, there was no evidence that Moore's standing with his peers was diminished as the result of the libel. Indeed,

the evidence shows that Moore's acquaintances supported him; one indicated that: "As far as I personally am concerned, . . . he lost nothing." Actually, the evidence showed that Moore continues to be held in high esteem among his community of friends and colleagues. Thus, we find that the amount of the verdict bears no reasonable relation to the damages sustained and, therefore, is not supported by the evidence. Hence, the trial court erred in refusing the post-trial motion to set aside the compensatory award as excessive. The court should have granted the motion and then considered requiring the plaintiff to remit a portion of the award or submit to a new trial under the provisions of Code § 8.01-383.1.

Section 6 of Article VI of the Virginia Constitution, dealing with the power of this Court upon reversal, modification, or affirmance of a judgment below, provides, in part: "In any civil case, [the Supreme Court] may enter final judgment, except that the award in a suit or action for unliquidated damages shall not be increased or diminished." We have interpreted this section: "The plain purpose of the provision is to leave to the factfinding tribunal--the jury or the trial court sitting as a jury—the function of fixing the amount

of unliquidated damages. It does not deprive this court of the authority to remand the case to the lower court with direction that the plaintiff be put upon terms to remit a portion of an award for unliquidated damages or else submit to a new trial." United Construction Workers v. Laburnum, 194 Va. 872, 900, 75 S.E.2d 694, 712 (1953), aff'd, 347 U.S. 656 (1954). Upon rehearing of Bishop v. Webster, 154 Va. 771, 153 S.E. 832 (1930), the Court said that "the power long exercised by this and all other courts to put the plaintiff upon terms, and to allow him the option of waiving a portion of his damages or have a new trial," is not affected or diminished "in the slightest degree" by the foregoing constitutional section. 154 Va. at 787, 155 S.E. at 828. For a case in which this Court diminshed a damage award, see Lorillard v. Clay, 127 Va. 734, 760, 104 S.E. 384, 392-93 (1920), decided before the 1928 enactment of the forerunner to the present constitutional provision. Acts 1928, ch. 205, p. 660.

Accordingly, we will reverse the compensatory award and remand the case with direction to the trial court to require the plaintiff to remit a substantial part of his recovery or else submit to a new trial upon the issue of damages only.

Next, the defendant contends there was insufficient evidence of actual malice to support the punitive award. We do not agree.

We have made an independent examination of the record on this issue to be certain that the judgment for punitive damages does not constitute a forbidden intrusion on the field of free expression. The trial court properly instructed the jury that the plaintiff was required to establish New York Times malice, that is, that Moore, by clear and convincing evidence, had to prove that Fleming knew the statements were false or that he made them, according to the instruction, "so recklessly as to amount to a willful disregard for the truth. . . ."

We will assume without deciding that Fleming is correct in his position that Moore failed to prove that Fleming knew the defamatory statements were false. Nonetheless, there was substantial, credible evidence to support the jury's finding that Fleming acted with recklessness that was tantamount to a willful disregard for the truth.

On this point, Fleming argues that looking through his eyes "at his world as it existed in January 1976 . . . the

only possible conclusion is that [he] was not motivated by actual malice but by genuine frustration." But evaluation of this element of proof must be from an objective standpoint, not merely from a subjective perspective.

Fleming abandoned all judgment and reason in composing and publishing the advertisement. For example, he accused Moore of racial prejudice without possessing any objective basis for the charge. Naming Moore in the publication, Fleming demeaned him as being a tenured position-holder living off the "public dole" at the expense of working people. There was no evidence that Moore, or any other person in a similar occupation, was being supported to the prejudice of other groups of citizens. There was no proof that Fleming had any legitimate reason to believe Moore wished to deprive "working people" of any opportunity. Fleming had no proper grounds to suppose that Moore, as one of the so-called "no-growth people" was oppressing other individuals. Fleming recklessly stated that Moore's opposition to the development on pollution ground was a "sham" to conceal his supposed real purpose, i.e., oppression of black citizens and others who would live in the planned community. Finally, Fleming's act

of publishing the advertisement in the student newspaper on the campus where Moore taught supports the conclusion that defendant's motive was to intimidate Moore in order to eliminate the voice of a leading opponent to Fleming's development.

Next, defendant contends the amount of the punitive award shocks the conscience in that it bears no relationship to the intended purpose of punitive damages, which is to punish the defendant for his conduct and to serve as a warning to others not to engage in similar activity. Defendant says the award of $250,000, plus interest on that amount from January 16, 1976, is unjust and establishes that the jury misconceived the law or the facts or was actuated by passion and prejudice.

The independent examination we make on the punitive-damage issue is not limited to proof of punitive liability. The First Amendment implications flowing from the amount of such an award require the reviewing court to consider the effect of approval of such an award on self-censorship in derogation of the right of free speech. Moreover, a jury verdict for punitive damages cannot be

allowed to work an injustice and result in oppression. Stubbs v. Cowden, 179 Va. 190, 199, 18 S.E.2d 275, 280 (1942). Where a punitive award is substantially in excess of what ordinarily might be expected as punishment for the particular conduct, the reviewing court has a duty to annul the award unless the circumstances are so egregious as to constitute a sufficient punishment for the wrongful activity. See id. at 200, 18 S.E.2d at 280. We hold that the amount of this award, including the interest factor, constitutes a forbidden intrusion on the exercise of free expression and that it is substantially in excess of adequate punishment for defendant's conduct.

Without question, as we have said, Fleming acted with actual malice. Nevertheless, the punishment for this excessive harangue is not merely punitive, it is destructive, even though Fleming estimated his assets at close to one million dollars. While the elements of compensatory damages differ from the requirements to establish punitive damages, many factors apply to both on appeal. For example, the absence of physical manifestation of Moore's emotional distress must be considered. The fact of no substantial reduction in Moore's

standing with his associates must not be overlooked. Indeed, Moore was not charged with commission of a crime. The amount of punitive damages awarded should bear some reasonable relationship to the actual damages sustained and to the measure of punishment required; otherwise, the award on its face indicates prejudice or partiality. Id. at 201, 18 S.E.2d at 280. This is such an award and it cannot stand.

Consistent with our disposition of the compensatory award, and on the same authority, we will reverse the punitive award, with direction to the trial court to require the plaintiff to remit a substantial part of his punitive recovery or else submit to a new trial upon the issue of damages only.

Because the main question regarding interest was not preserved properly in the trial court and because the interest issue may not arise upon remand, we do not address that question. In addition, we deny the plaintiff's motion to dismiss.

For these reasons, the judgment below will be affirmed, in part, reversed, and remanded for further proceedings consistent with this opinion.

Record No. 830758	-	Affirmed.
Record No. 830526	-	Affirmed.
Record No. 830651	-	Affirmed, in part, reversed, in part, and final judgment.
Record No. 831446	-	Affirmed, in part, reversed, in part, and remanded.

Poff, J., concurring in part and dissenting in part. Harrison, Retired Justice, concurring in part and dissenting in part.

THE GAZETTE, INC.
v. Record No. 830758
JAMES WILLIAM HARRIS, et al.

CHARLOTTESVILLE NEWSPAPERS, INC.
v. Record No. 830526
DEBRA C. MATTHEWS

PORT PACKET CORPORATION
v. Record No. 830651
E. GREY LEWIS, et al.

JAMES N. FLEMING
v. Record No. 831446
W. BEFORD MOORE, III

Poff, J., concurring in part and dissenting in part

I do not approve the compensatory-damage standard of liability the majority imposes upon the media defendants.

The free press clause of the First Amendment was designed, not so much as a license for publishers, but as an engine of the people's right to know what the press is uniquely equipped to discover and report. The goal of the majority, which I applaud, is to strike a public-policy balance between the interest a private person has in his good name and the interest the public has in the media's freedom to publish. When a defamatory publication causes these

competing interests to collide, courts must weigh constitutional values and resolve the conflict by defining the standard of liability. Except for cases involving qualified privilege (a concept left undefined), the majority has adopted a simple-negligence standard. I fear that standard creates an impolitic imbalance between the competing interests.

The actual-malice standard weighs heavily in favor of the media defendant at the expense of the injured private plaintiff; on the other hand, the simple-negligence standard tends to chill both reportorial free press and editorial free speech, and self-censorship by a timorous media disserves the people's right to know. I would reject both standards and strike a balance midway between the two extremes.

For compensatory-damage claims, I favor a gross-negligence standard. Specifically, I would hold that, when the content of a false publication makes substantial danger to the reputation of a private person apparent, that person may recover compensatory damages against a media defendant if he proves by a preponderance of the evidence that the defendant's negligence in the investigation and verification of the content of the publication was so gross as to shock

the conscience of fair-minded men and so heedless of the truth as to evince a flagrant indifference to his rights. See Chapadeau v. Utica Observer-Dispatch, Inc., 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569 (1975).

I recognize that the courts of most states, exercising the discretion granted in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), have adopted the simple-negligence standard. We ought not fear to join the minority. This Commonwealth first proclaimed the free-press principle in 1776 in Article XII of the Virginia Declaration of Rights, and James Madison was largely responsible for inclusion of the first Amendment in the Constitution of the United States. In my view, a rule which makes publishers and broadcasters liable for simple negligence weakens Virginia's historical commitment to freedom of the press and encumbers the right of the people to learn what they need to know to govern themselves wisely.

In keeping with the standard I have defined, I will concur in part and dissent in part. In the Gazette case and in the Charlottesville Newspapers case, I must dissent from the decision to affirm the several verdicts because each

was based upon an instruction defining the simple-negligence standard. For the same reason, I dissent from the decision to affirm the compensatory-damage award in the Port Packet case; however, I concur in the decision to reverse the punitive-damage award in that case because I agree that the evidence fails to show actual malice. In the Fleming case, I concur in full.

THE GAZETTE, INC.
v. Record No. 830758
JAMES WILLIAM HARRIS, et al.

CHARLOTTESVILLE NEWSPAPERS, INC.
v. Record No. 830526
DEBRA C. MATTHEWS

PORT PACKET CORPORATION
v. Record No. 830651
E. GREY LEWIS, et al.

Harrison, Retired Justice, concurring in part and dissenting in part.

The opinion of the majority finds precedential support in cases decided by this and several other state courts. I agree that in each of the cases under review the defendant failed to exercise ordinary care and therefore acted negligently. This dissent stems from my disagreement with the Court's refusal to adopt in defamation cases as a matter of state law a stricter standard than that of ordinary negligence. Ordinary care is that care which is commensurate with the occasion. It is not absolute or intrinsic. It is always relative to some circumstances of time, place, manner, or person and becomes a question of fact to be decided by a jury.

Juries are randomly selected, and the principal criteria for service thereon is not to be a felon, not under age eighteen, and not unable to communicate in the English language. Present-day juries often return verdicts that are completely out of proportion to the harm done. The verdicts under review are no exception. Trial judges are reluctant to disturb the verdict of a jury. Appellate courts are equally as reluctant to sustain a trial court when it does take such action.

I do not concur in the suggestion that a gross negligence standard be adopted. The distinction between gross and ordinary negligence is too vague and shadowy to be of any practical importance. The difficulty that courts and juries had in making this distinction in motor vehicle accident cases caused the General Assembly to abolish the gross negligence standard in guest cases. Virginia Code § 8.01-63. I have no reason to believe that a jury or a court would find it any easier to make the distinction in defamation cases.

I would adopt the New York Times standard which permits the recovery of compensatory damages for a defamatory statement only when such statement is made with

knowledge that it is false or is made with reckless disregard of whether it was false or not. And I would make the same standard applicable to the media and non-media defendants. Any lesser standard will inevitably have a chilling effect on free speech and the free press and will erode the safeguards protected by the Constitutions of the United States and Virginia.

The majority opinion does limit the application of the negligent standard by requiring a trial judge to find as a matter of law that the defamatory statement "makes substantial danger to reputation apparent." Although I approve the limitation, I fear that it will prove in practice to be one of form rather than substance. What is defamatory and when it is harmful are questions of fact. Judges will be just as hesitant to "take a case away" from the trier of the facts as they now are to set aside the verdict of a jury once it has been rendered.

Because I am of opinion that the defendants in The Gazette, Inc., Charlottesville Newspapers, Inc., and Port Packet Corporation were guilty of simple negligence only, a standard which I would not adopt, I dissent from the decision

affirming the compensatory-damage awards in the cases. I concur in the action of the majority in reversing the punitive-damage award in the Port Packet case. I did not participate in Fleming.

APPENDIX H

SUPREME COURT OF VIRGINIA

JAMES N. FLEMING,

Appellant,

-against-

W. BEDFORD MOORE, III,

Appellee.

Record No. 831446

February 1, 1985

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday the 1st day of February, 1985.

James N. Fleming, **Appellant,**

against **Record No. 831446**
Circuit Court No. 976-L

W. Bedford Moore, III, **Appellee.**

Upon an appeal from a judgment rendered by the Circuit Court of Albemarle County on the 3rd day of June, 1983.

For reasons stated in writing and filed with the record, the Court is of opinion that there is error in part in the judgment appealed from. Accordingly, the judgment is affirmed, in part, reversed, in part, and the case is remanded to the said circuit court for further proceedings consistent with the written opinion of this Court.

The Court has held that the compensatory award of $100,000 is excessive and that the punitive award of $250,000 is excessive. It follows that the award of any

prejudgment interest on either the compensatory or punitive award, even if such interest on a punitive award is allowable in a proper case, merely increases the excessiveness of the awards by the amount of the interest.

Accordingly, without passing on the legality of an award of prejudgment interest on punitive damages, the Court has determined that the whole interest factor is grossly excessive and shall not be used by the trial court in computing the amount of the remittitur.

Thus the plaintiff shall remit the entire amount of the prejudgment interest, a substantial portion of the punitive award of $250,000, and a substantial portion of the compensatory award of $100,000, or else submit to a new trial upon the issue of damages only.

The appellant shall pay to the appellee the costs expended herein.

This order shall be certified to the said circuit court.

A Copy,

Teste: /s/David B. Beach
Clerk

Apellee's costs:

Attorney's fee	$50.00
Cost of printing brief not to exceed $200 - Code § 14.1-182	

Teste: /s/David B. Beach
Clerk

APPENDIX I

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING

Defendant.

Law No. 976-L

October 7, 1982

Transcript pages 28-38

that, Mr. Poindexter? Until we hear the evidence, or is there something in the interrogatories or the pleadings that would indicate it?

MR. POINDEXTER: Yes, sir, we believe there's ample record for the Court not to conclude that a prayer for punitive damages is not permitted in this case, given the record backdropped against the opinion of the Supreme Court. There is no way, if Mr. Moore does not intend to radically depart from the evidence that was given, that the trier of fact could find a deliberate misconstruction of the truth or an utter wanton disregard for the truth of anything that Mr. Fleming said and that throws aside all the questions of privilege and everything else. And at some point such an absurd claim should be disposed of so that it does not clutter up whatever remains in this case. But punitive damages - punitive damages are simply not in this case.

THE COURT: Did the Supreme Court address that in anyway in its opinion?

MR. PHEMISTER: Yes, they did, Your Honor. On page ten of the opinion they talked about the punitive damage claim. I hope I'm referring you to the right page. Yes. The court said, on the basis of Gertz, we vacated an award of punitive damages entered against a publisher where the award was based upon a finding of common law malice and held that it was necessary to show knowledge of falsity or reckless disregard for the truth by clear and convincing evidence before punitive damages could be awarded. Newspaper Publishing Corp. against Burke.

THE COURT: Then it goes on to deal nonmedia defendants, which is what we have here. Since Fleming is not a media defendant and Moore is not a public figure, Gertz does not control the present case, nevertheless we share the concern expressed in Gertz at the assessment by juries of punitive damages, in holding unpredictable amounts bearing no necessary relation to the actual harm caused. Therefore, we hold that any instruction on punitive damages must be structured upon the same standard of proof of "actual malice" as defined in New York Times, applied in Gertz and followed in Burke that is required in defamation actions against media

defendants. That is they're saying now that they have not previously applied it to nonmedia defendants but they're now extending the rule to nonmedia defendants so they're saying.

MR. PHEMISTER: I think in anticipation of the Supreme Court ruling, the United States Supreme Court's ruling, but they have said that the same standard applies with nonmedia defendants as media defendants, and therefore Gertz in fact does control the case. And the other part of the motion on the punitive damage claim really ties into the motion to dismiss. You'll notice in the reference back on page ten, up at the top right before the portion of the paragraph that I was reading the Virginia Supreme Court is discussing the Gertz Case and the Virginia Supreme Court notes that the award of damages without the proof of actual injury was condemned, when they say was condemned they mean by Gertz and here they are quoting the Gertz Opinion, inviting juries to punish unpopular opinion rather than to compensate individuals for injuries sustained by the publication of a false fact. Now, if you had to crystalize the libel in this case, the contended libel on the part of the Plaintiff you would have to say that it's a claim on the part of the Plaintiff that he has

been called a racist and if we take that for the purposes of our argument as the libel and boil it all down and say this is what it really means, this is what we argue to the jury that the libel was, that Mr. Fleming called Mr. Moore a racist. We submit to the court that not only is this case subject to a Motion to Dismiss it also is not a case for punitive damages because there is no false fact. If I call you a racist it's a statement of opinion, with Your Honor's permission, and what I think is a racist may differ from what Mr. Moore thinks is a racist. He may take deep umbrage at a comment that I consider not demeaning in any shape or form and because it is an unquantifiable subjective consideration it is not a fact, it cannot be false and we contend cannot be the subject for punitive damages or for that matter libel.

THE COURT: Why wouldn't the Supreme Court then have reversed the case and entered final judgment?

MR. PHEMISTER: The minds of the Supreme Court Your Honor is something that we can only hope to...

THE COURT: Why should I do the job for them at this stage? I think I have already made that comment. They had the opportunity to reverse and enter final judgment

and didn't and you are now saying this court should do it behind the Supreme Court without trying the case aren't you?

MR. PHEMISTER: No Your Honor, I wouldn't characterize my remarks that way. I think in fact the Supreme Court shows an error or ground on which to reverse it, perhaps looking for some clarification but I don't see what that clarification could be. I think the case is right at this point.

THE COURT: I am not going to require any further argument on that point. I took it up with Mr. Poindexter when this case first arrived back at - in this court and we spent a considerable amount of time and I made a ruling on that and indicated that the Supreme Court if it had chosen to could have, for whatever reasons it might have found appropriate, dismissed and entered final judgment. In fact, the dissenting opinion indicated it should have been; but it is not up to this court to do having tried it once and the Supreme Court having reversed it and sent it back for retrial. The only thing I can do is rule that it's available for retrial unless the plaintiff has in some way gotten himself in a different position since the case was sent back for retrial and

not having such information I therefore overrule the motion for dismissal and also with respect the issue of punitive damages. I don't see how the case can suddenly take a turn different from what it was when it was sent back here from the Supreme Court. I do have grave misgivings about the posture of the case when you get to that stage. I think it would have to be based on the evidence and until the evidence is actually presented to me and the court evaluates the evidence it would be inappropriate to rule on this question of punitive damages. I think a Motion to Strike would be the appropriate place for that to again be considered.

MR. POINDEXTER: Your Honor, may I just ask a question for clarification?

THE COURT: Yes sir.

MR. POINDEXTER: That is the value of Mr. Phemister's thought in this because it had kind of escaped us to the point that he introduced it. If you call somebody a thief you can prove it, you can go out possibly and get a record and show that what you said is the truth. If you say somebody has a veneral disease it's possible that you could go back and get records and prove that; but if Mr. Fleming or I

should call someone a racist there is no way that what I said could be disproved and there is no factual way that I could really prove that to the satisfaction of everybody so it becomes not a fact but a highly subjective value judgment. For example, there was an article, an editorial, in the Progress Index under the broad heading Racism in the Reservoir and it took to task Mr. Fleming and Saad El Amin who was known at that time as JeRoyd Greene for introducing, even daring to introduce the thought that someone in this area was discriminating against Mr. Fleming because he was black and it concluded by saying that perhaps the persons who make this accusation are guilty of racism or whatever. Now, I can't imagine that that kind of editorial would give rise, or would have given rise to a cause of action. Just like I could not imagine that that article that Mr. Fleming had put in the newspaper would have caused us the consternation that it has; but whether Mr. Fleming and Mr. Saad El Amin were indeed were racists was simply a perception of that editorial writer down here at the newspaper and whether Mr. Moore is a racist, we say we never called him that, but if he insists that we have called him that so what, it is at Mr. Fleming's

perception and Mr. Fleming could probably see all the evidence in the world and not be detered by it; but it cannot be proven or disproven in any objective quantification that a jury or tryor of fact can say this is it, he is not a racist, he is a racist, give him some money, don't give him some money and that is the reason that we believe that this lawsuit has simply run out of steam and it should not be allowed to linger - it has been around now for seven - six years and we are no closer to a resolution of this thing than we were six years ago and there has been the intervention of a case recently coming out of the boycotts of Mississippi, NAACP versus Claiborne which adds greater value to the value coming to our right of free speech and exchange of ideas and we just believe firmly that Mr. Fleming had a First Amendment Right to say what was said and that a court, without putting us to a jury, should put an end to this lawsuit. If Claiborne is the case that does it then Claiborne is indeed the case and we believe that Your Honor should, despite what the Supreme Court may have said, take up the implications of the most recent decision in this area by the United States Supreme Court and rid us of the uncertainties of this lawsuit.

THE COURT: Well, are you saying that that was not presented to the Supreme Court, was not taken as an exception or one of the basis of the appeal? The term itself was one that could not lend itself to an action. What does the dissent say?

MR. POINDEXTER: Dissent is what we say.

THE COURT: Yes. Why should this court follow dissent? You are asking this court to reverse the Supreme Court and file a dissent. Sometimes we are often tempted but it's not done. It's not the law. Now, I had this question addressed in the Palumbo Case and I did considerable research, I might not have written a very long opinion but I recall the great deal of attention that was given to this question of opinion as opposed to fact. Mr. Albro, was there a written opinion from this court in that case? On the preliminary motion?

MR. ALBRO: Yes sir.

THE COURT: I may have to retreive it and look at it again but a lot of attention was given this very point that Mr. Phemister and Mr. Poindexter now raise and that is it was not a false allegation of fact but rather one

of opinion, a question of mixed fact of opinion and I commented in my ruling on that very aspect of that Palumbo case, it didn't get to trial, it was settled wasn't it?

MR. ALBRO: Yes, it was settled.

THE COURT: That was a very strong point made by the attorneys for the, what was it, television station?

MR. ALBRO: Channel Six.

THE COURT: I may want to look at that but I have made my ruling and I certainly am always open to taking the second look which I will do and I note your position as to the difference between fact and opinion; but the problem that I have with it is that again we come back to this question of characterization of the terms that the Supreme Court had an ample opportunity to deal with. Let's look at Justice Harrison's Dissent. I think we dealt with a number of cases that were not in this Commonwealth when we dealt with this question of fact and opinion; and cases from all over the country were analyzed in that context and I'll review that further and let the judge who may try the case have the benefit of that research and the memoranda on each side. It

is never put to rest but I think anytime a judge enters final judgment, or what amounts to a determination of the merits of the case until the evidence is before the court, has to be based entirely on the pleadings and the answers and responses to interrogatories and I can't see how again that would be a new ingredient that would allow this court to dismiss a case at this stage which has been sent back for retrial.

MR. POINDEXTER: Your Honor, I asked Mr. Moore this morning to name some racists and he earlier named Andrew Young and he said Senator Bilbo and the late George Lincoln Rockwell. But I would think that those persons were not necessarily racists in the eyes of all persons who preceded them and that just shows some of the difficulty that is associated with trying to quantify and talk in objective terms about a racist. Mr. Albro could be a racist to me but he may not be to Mr. Phemister and we would have our different points as to why Mr. Albro is a racist but we would never resolve that and it's unfair to try to put such a vague question to a tryor of fact and that of course gives us a problem in damages, even if we agree that this is an article which has harmed this gentleman. Another one was published

in the Tribune a week before that and he was harmed by that, he said about equally; and he has filed a million dollar lawsuit based upon that. He filed a million dollar lawsuit over here, they are right across the street. Now, how does he distinguish between what harm he felt, what injury, what emotional stress, what suffering he has experienced from the Cavalier Daily article which was published twice as opposed to the Tribune article? He told us this morning that the Tribune article had an impact, probably a greater impact in the black community, among his black friends; but you can't distinguish for the jury in a certain sense what harm the Cavalier Daily article did as opposed to the Tribune article and it has been an old teaching that when damages and injuries are so vague they cannot be ascertained you have no case.

THE COURT: Mr. Poindexter, I have made my ruling and I'll merely note this for the benefit of your objection and the record which will have to be preserved, if it's appropriate, and that is, the evidence presented had it not been for objective testimony may well have caused the court to sustain a motion to strike, had it been entirely subjective

by the plaintiff your point would be well made but as I recall the evidence and certainly the plaintiff has a right to bolster his case with evidence there was objective testimony to the effect that this term used in the context of the University of Virginia Campus at the time when used was more than subjective damage. People who were in positions to testify I suppose almost as an expert and I recall specifically the former President of the University of Virginia in dealing with the position of a faculty member being termed a racist on his campus. Now, that was the evidence. I would certainly agree with you that in the vague sense and out of the context of the surroundings that these words were uttered in you may have an entirely different result just as the old classic case, you can yell fire on the street, that's one thing; if you yell fire in a crowded theater it's another and that's exactly what this case according to the evidence went to the jury on and I have no qualms about your position that subjective reaction is not necessarily compensible. It has to be based in objective criteria and in this case if the plaintiff doesn't provide it then he is always subject to a motion to strike, as was the other case and I think I refused to sustain a Motion to Strike

based upon the fact that it was not his own reaction to it, it was the objective evaluation of his position as a faculty member at the time the utterance was made in the context of the student body and this being a student newspaper. I think I made the comment had it been published in some other publication which was not normally circulated on the campus, not primarily designed to be circulated on the campus, you certainly would have had a different situation. I certainly made a distinction between a normal publication and that which in effect searched out the plaintiff within his own area of work. That was the basis upon which the evidence came in. I don't

APPENDIX J

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

October 21-22, 1982

Transcript pages 539-40

the court?

MR. ALBRO: The, the law in every jurisdiction that I'm aware of is that the determination of public figure status is made by the court and it was made by the court in this case in the first trial and I don't know of a single case anywhere that says public figure-private person status is a determination made by the jury.

THE COURT: Do you have any contrary authority, Mr. Poindexter?

MR. POINDEXTER: No, sir.

THE COURT: All right, the court concludes that it is a matter to be determined by the court. In viewing the evidence relating to Mr. Moore's conduct and his position relative to the public, we can find no evidence that establishes him to be other than a private person. The court is also persuaded that based on the language contained in the last sentence of the first full paragraph at page 892, 221 Virginia, case of Fleming versus Moore, that the only proper inference to be drawn from that sentence is that Virginia is on the negligent standard in regard to this determination.

Consequently, both instructions we feel would be proper for the jury, both as to preponderance of the evidence and the burden of proof where there is a requirement of clear and convincing evidence. It will be granted as 9 and 10 respectively.

MR. CARTER: If the court please, we want to add our exceptions to that ruling.

THE COURT: Exception noted.

MR. CARTER: To both those issues.

THE COURT: Exception noted as to each issue. All right, the next instruction, the verdict must be based on the facts as you find them and on the law contained in all these instructions. The issues on this case are: (1) Did the defendant make the statements contained in the advertisement headed "Racism" appearing in the January 15 and 16, 1976 editions of The Cavalier Daily newspaper? If he did, were they seen by someone other than the plaintiff? (3) Are the statements about the plaintiff? (4) Are the statements false? (5) Are the statements defamatory? (6) Did the plaintiff sustain an actual injury as a result of the statements? On these issues the plaintiff has the burden of proof.

(7) Are the statements substantially true? On these issues the defendant has the burden of proof. (8) If the plaintiff is entitled to recover, what is the amount of his damages? On this issue the plaintiff has the burden of proof. Your decisions on these issues must be governed by the instructions that follow. Maybe we'd better consider those instructions before we....well, do you find anything objectionable about the first part?

MR. POINDEXTER: Yes, sir.

THE COURT: All right, which number do you find objectionable?

MR. POINDEXTER: There is an omission. The omission is

APPENDIX K

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

October 21-22, 1982

Transcript page 22

THE COURT: All right, I will ask the jury to step into the jury room please.

(Jury retired to the jury room at this time)

THE COURT: I will ask the members of the jury who have been excluded from the panel to step into the hall please. Do not leave, just step into the hall briefly, those of you who have been excluded from the panel.

(Rest of the jurors retired from the courtroom)

MR. CARTER: If the court, please, I want the record of this trial to show that the three blacks that were on this jury, one of them disqualified himself and the other two were put off by the defendant and I want the record to show that and I want it to be very clear that the race issue in this case...he is entitled to have black people on that jury just like everybody else has and I resent the fact that they made a point, the first two were blacks, to put them off the

jury and I want the record to show that's what happened and we except to it.

THE COURT: The record will so reflect. All right, you may bring in the jury.

MR. CARTER: I would move to quash the panel.

APPENDIX L

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

October 21-22, 1982

Transcript pages 373-87,
514-23

matter up now then.

MR. ALBRO: All right, sir, I think that is actually something that was going to be reserved for a motion to strike if that's what you want to take up at this time.

THE COURT: All right, if there's nothing else then other than the motion to strike and with the reservation of putting on evidence as to the wealth of the defendant in the event the plaintiff prevails in his contention the Court is prepared to release the jury and hear the motion to strike if there is one.

MR. POINDEXTER: Yes sir.

THE COURT: All right, bring the jury back in. All right, ladies and gentlemen of the jury, you need not get settled back down into your seats, we're going to release you now with the request that you be back in the morning at 10:00 to resume this case. The attorneys and the court will proceed to take care of some matters which you are not needed for. So you are now excused until tomorrow morning at 10:00. Let me remind you, however, not to discuss this case or allow anyone to discuss the case with you during the

time that you are recessed. You may withdraw. All right, the jury has withdrawn.

MR. POINDEXTER: May it please the court, Your Honor, first we would respectfully submit that given all the ... all the evidence heard in this case today, no case framed against the context of, framed against the decision of the court in this case previously. No case has been made out to go to the jury, because the case includes Mr. Fleming's own recital which would rebut any suggestion of wrongdoing on his part which would give rise to the cause of action. It would seem that the plaintiff has had to show to this point at least by a preponderance of the evidence of defamation, a libel. Other than conclusionary allegations on the part of the plaintiff, first of all missing from that is the component of damages. Now, Mr. Moore has testified as have his witnesses that there was no damage. That would have to be a necessary component of his case. There is not enough in simply saying that I was distressed, simply saying that I was greatly embarrassed, that is not enough under the measure or the test provided in Fleming v. Moore to allow a jury at this point, if we did nothing else to speculate on the worth of his case.

The other part of it is that we would have to insert again our right to say things, though they might have fallen unpleasant, though they might have given rise to anger on the part of Mr. Moore. Mr. Fleming has a constitutionally protected right given all those circumstances that we now know comprised the conflict between these two men to say what he believed to be true as it concerned him at that time. If Your Honor would have had an opportunity to research some authority, I doubt whether you would have found any case with an unsettled judgment wherein the allegation was that someone was called a racist or someone suggested that that person was inflicted with race as a standard for libel. We have found no such authority. Perhaps Mr. Albro can suggest something to the court but you have to view the assertion by Mr. Fleming that the claim of race is within the context of what happened to him and how Mr. Moore was involved directly or indirectly in that occurrence. And the case has to be weighed in that light and then insert in that measurement this first amendment protection. The first amendment protection runs whether or not he is a public figure, but if he is a public figure as we submit that he must be found to be at

this point, the burden becomes one of showing by clear and convincing evidence that Mr. Fleming purposely lied or was so reckless in what he said about the man until it was tantamount to a lie. And if you measure, if you take that test and measure it against what is the evidence in this case you cannot, you cannot come to such a conclusion given the, certainly given the higher test, not even given the minimal preponderance test because what he said must be measured in a subjective rather than objective sense. If he believed what he said was true that's sufficient. Whether it was true or not, he made a mistake, he's not responsible for it. There must be some culpability. He's not punished in a libel case for negligence, he is punished for a malicious state of mind. And there's simply nothing in here to that effect. Here's a man who saw his dreams for his subdivision out there abolished in effect by what he perceived as the racist conduct of Albemarle County officials who were encouraged and abetted by citizenry all of whom suddenly rose up when he as a black person tried to initiate a development in an area where he had seen white developers develop their property, sell their property, encroach upon the reservoir and all at once he is

swamped by these claims of pollution, he is swamped by a house suddenly being designated a historic landmark that's only forty some years old despite the fact that I'm sure it is a significant piece of architecture. He is swamped by all sorts of concerns that have never before been expressed in this community. It was not unreasonable under those circumstances for him to have lashed out in the fashion that he did in the ad which was published in The Cavalier Daily on January 15th and 16th, 1976 and in order to go forward at this juncture, Your Honor, it would seem that you would have to find that there is some room for him to have told, intentionally told a falsity and that simply is not evidence in this case. Given the fact that he's testified that, believed it then, believes it today. And we submit that at this point the case should not be submitted to a jury on any grounds and, of course, that would mean that we would have to have not to respond to it beyond the response that has been elicited through the examination of these witnesses. There is no burden upon us.

THE COURT: All right, Mr. Albro.

MR. ALBRO: Thank you, Your Honor. Your Honor, I think perhaps the way to approach this issue is to consider the law and what we're going to have to ultimately instruct the jury. I state for the record only because I think it should be stated not because Your Honor doesn't know, obviously at this state all of the evidence that was admitted must be viewed in the light most favorable to the plaintiff. And all proper inferences that could be derived therefrom must similarly be so viewed and having said that the issue that confronts us now is have we made such claim as to create the jury question. Have we put on such evidence that is so as to have created a jury question on the key issues. The first issue in the case is did the defendant make the statements complained of in the advertisement. That, of course, is not denied, that's a given. The second issue is if he did, were they seen by someone other than the plaintiff. And we have had such testimony. That is not an issue. The third are the statements about the plaintiff. The plaintiff is the only living human being referred to in that ad and as we know from his testimony and that of others there are

numerous references in that ad that relate back logically and directly to the plaintiff. That's not an issue. The fourth issue, are the statements false? This is with particular reference to the charges of racist behavior and racism. Of course there is a dispute between the parties as to that, but the issue is at this juncture is the defendant entitled to strike our evidence, have we not shown falsity. We have shown falsity. We have shown falsity in two contexts. First we have shown clearly and unequivocably Bedford Moore is not in general a racist, and I'm not going to regale the court with the specifics of the testimony. But suffice it to say those who have known him intimately and well, socially and professionally recoil the notion that this man harbored any ill will against any person because of the color of his skin. It is false that he is a racist. It is false that he is an adherent of racism, both of which charges are leveled against him in the ad. Are the charges leveled against him false specifically with reference to this project. And again viewing our evidence in the light most favorable to us, the answer is undeniably yes, we have shown they are false. He was never at any time, in any context motivated by the race of the applicant, nor was

he motivated at any time in any context by the race of those persons who might possibly live in Evergreen were it ever developed. I think particularly on this issue is the testimony of Mr. Murray. Because apart from anybody else in this case Mr. Murray occupied a confidential relationship with Mr. Moore, and he was bound by a professional privilege. And at that time Mr. Moore could have said anything of any kind and expressed his true feelings about Mr. Fleming and his development, and Mr. Murray didn't even know the man was a black man until he went to the Planning Commission and found out quite by surprise that he was a black man. Although he had met with Mr. Moore once alone and once with Henderson Heyward, it never came up. The simple fact of the matter is that he has never at any time done anything with respect to this defendant or his planned development that was in any way shape or form racist or based upon an adherence to some form of racism as that has been defined or defamatory. I think first, in the first instance that's really been taken away from us by the Supreme Court of Virginia. If they weren't defamatory they would have reversed it in their final judgment because the self same ad in every

particular was a front argument when we took this case down to Richmond on appeal from the first trial. Albertus Harrison dissented, he was out voted I think five to one, and the grounds of his dissent was that it was not actual, it was not defamatory and he prevented final judgment. He stood alone. I think the Supreme Court of Virginia has ruled that it's defamatory, because if it weren't we wouldn't be here. But suffice to say we're going to have to instruct the jury on the issue nevertheless. I don't suggest we take that away from them. But that is peculiarly a jury issue. The definition of defamation is does it hold the man up to public contempt, scorn and ridicule. That is a decision that is made by the jury in the context of this community bringing to bear their common experiences and understandings of terminology as members of the community. It is simply no way that issue could be taken away at this juncture. Did the plaintiff sustain actual injury as a result of the statements, yes, clearly he did, undeniably he did and that hasn't been controverted. Now, I must frankly confess I don't know what Mr. Poindexter is talking about when he says that the testimony is that there's no injury here. The Supreme Court of Virginia in the

majority opinion in Fleming v. Moore concluded we hold, this is at 894 of the 221 Virginia opinion, we hold that Moore is entitled to recover compensatory damages upon proof of actual injury including such elements as damage to his reputation and standing in the community, embarrassment, humiliation and mental suffering. Special damages which under the common law rule must be shown as a prerequisite to recovery where the defamatory rewards are not actionable per se are not to be limited to pecuniary loss. He's testified to humilitation, embarrassment, a stain on his reputation and various other forms of mental anguish. Furthermore, we have, also had testimony that serious questions were raised about this man among people who did not know him intimately, particularly that which was raised by Mr. Elwood. Black persons who were at the University who didn't know him who were suddenly now concerned about who this, what this individual truly thought as a member of this self same university community. Now, insofar as the allegation by the defense that if the defendant believes in what he says there is no case. That is not the law any where in any jurisdiction. Because if it were every person who was ever sued for defamation could

merely walk into court, file an affidavit stating I believe what I said was true, and he'd be entitled to summary judgment. That is not the way it works. We know that insofar as compensatory damages are concerned, we have to prove that he was in some way negligent in his conduct toward this plaintiff. And I think we have shown it in the way he has conducted himself and the way in which he recklessly leveled charges of racism and racist behavior in spite of all the public record and all the evidence that was available to him. That is more than negligence, that is knowledge of falsity and/or reckless disregard for the truth and that is peculiarly a jury question and there's simply no way that we can say at this juncture that a jury question has not been created on that issue. Now, in the Virginia Model Jury Instructions the clear and convincing evidence standard which must be shown as to knowledge of falsity and reckless disregard for the truth which is the standard for punitive damages is defined as production of evidence that simply creates in your minds, referring to the jury, a firm belief or conviction that he has proved the issue. All right, can we say on this evidence, taking it in the light most favorable to the plaintiff that we

have given this jury evidence upon which it could properly reach a firm belief or a conviction that the charges of racism or a racist behavior leveled against the plaintiff by the defendant were made either with the knowledge that they were false or with a reckless disregard for whether they were true or not. And on that score there is more than ample evidence to let this case go to the jury. We know for example by his own testimony that this defendant attended every Planning Commission and Board of Supervisors meeting that occurred before January 15, 1976 on this first and second Evergreen plans. At that time and in those meetings overwhelming evidence from a whole host of sources was introduced to show that this proposed development posed a serious threat to the life of the reservoir. Persons who had no particular interest in Mr. Fleming or race or anything else, persons who lived in the area, persons who lived outside of the area, private groups, citizen groups, individuals, the League of Women Voters, the State Department of Health, the State Bureau of Sanitary Engineering, it's all in those exhibits and it just goes on and on and on. But what is absent from all of them is evidence of racist behavior on anybody's part but what is certainly clear from that evidence is that race

was used as a weapon and the jury may so conclude based on that record, it was used as a weapon by this defendant when he couldn't get what he wanted by legitimate means and the race issue was injected first and through out by the defendant and through the attorneys he employed to speak on his behalf. He had said in his ad that pollution was a sham, that it was an excuse, he said that all of these people were conspiring against him based on race from the League of Women Voters to Delegate Murray all the way down to Bedford Moore and he has no proof of that. He is utterly without proof. Perhaps he will put on some proof that will create a doubt in the minds of the jury but it's not here now. It was not a sham, and I asked Mr. Tucker, Mr. Tucker based on your experience what scores of development in the county, in and about the reservoir and throughout the county, was this a sham, were these people in there stopping Bedford, stopping James Fleming from his race. It said it was most definitely not a sham, it was anything but a sham. There is the suggestion that because Mr. Hurt got the Ivy Farm project approved and because Mr. Wood though he never built it because he wasn't allowed to build it, got the Panorama approved,

that this proved racism and somehow this relates to Bedford Moore. But what is clear from the record is that first of all both of those developments were quite distinct, they were zoned for what was going to be built there. They didn't have to go through the public hearing process that Evergreen went through. They were a different density than the case of Evergreen. But they were certainly differently zoned. Furthermore, although the defendant takes the position that because they were approved Mr. Moore is a racist, he freely admits he never talked to Wendell Wood. He freely admits he didn't go to all the meetings on Ivy Farm, nor did he go to all the meetings on Panorama. We know that Mr. Moore when he was challenged by Mr. Puryear before the ad was published and asked where was Bedford Moore when Panorama was considered, Bedford Moore told him at a meeting that Mr. Fleming attended and his lawyer attended. He said I was right here. Sitting right in this room tending opposition but there was a difference in the zoning. And a fine difference perhaps, but not to an experienced realtor, not to a person who has all those certificates that I asked him about and all of that long experience. He knows that difference and he

knew the difference and the jury may so conclude that he knew the difference between all of those. The only thing I suppose on which there is some question is the Ivy Farm issue in which he says well I did talk to Dr. Hurt and he did tell me that Mr. Moore didn't oppose Ivy Farm. And that's supposed to give credence to his conclusion that it was all a racist conspiracy that Bedford Moore was hatching against him. But he was impeached on that point. And his prior sworn testimony was to the effect that he had never talked to ... talked to Charlie Hurt about this development. He has also told them what is a complete phoney, a complete red herring and that's the racially restricted covenant which he testified this man was also using against him. That was one of the reasons he was convinced that it was racist. This was one of the reasons he published the ad, that's a phoney, he knows about these. He knows where they are. He knows how they're indexed and it was abundantly clear that there was nothing in any of those deeds that was to be used at any time against him. Specific reference to not reimposing any of those convenants and in point of fact he testified he knew they were not enforceable. He was well aware of the

effect of Shelly v. Kramer from 1947 which ruled that those things were by the boards, no longer enforceable. He said there were no other buffers, Mr. Tucker has testified there were certainly other buffers before this buffer. So far as the origin of the buffer is concerned that perhaps is one of the bigger problems that this defendant has. Because he alleges the buffer was a brain child, children of Mr. Moore and that it was Mr. Moore's creation. And the point of fact it was not his creation. Mr. Moore was in fact surprised to learn it was added as a condition when he attended a public meeting after the staff had made it's report and put the condition in there. And he attended that meeting, we know he attended that meeting. The Planning Staff report was read to him at that meeting in which, in great detail. Mr. Tucker read why the buffer had been proposed, where it came from and what it's purpose was. He knew that, and the jury may so conclude that he knew that. Never once did Bedford Moore utter a single thing or do a single thing that indicated racial anomalous toward this plainiff. We also know relating back to this buffer and historic landmark designation that he knew perfectly well this historic preservation was not a sham as he

alleges. And that was one of the reasons he put the ad in, because he knew it was a sham, it was really because of racist behavior, racist conspiracy. And the jury may certainly disregard all of that. Finally, The Cavalier Daily, what can the jury conclude about that? We know that this defendant was upset with The Daily Progress because it had mislead it's readers. And he said so I went to The Cavalier Daily. Now, he claims he didn't know Mr. Moore taught there but he was impeached on that. But he certainly testified he knew Mr. Moore worked at the University. And he went into The Cavalier Daily, a paper whose circulation was unknown to him by his own testimony, didn't know who read it and he put his ad in there. He put his ad in there at a very peculiar juncture in the history of the county and it's supervisors and the collection. And I think the jury may safely conclude one of the reasons why he didn't go back to create misconceptions in the minds of the readers of The Daily Progress was that he was not seeking to set the record straight. He went after a tenured professor at the University of Virginia because he knew where he lived and he could do some damage there. He knew all about tenure. And if you read that ad straight

through there is no question that the only living person named in that ad is referred to throughout the ad. I go through that, perhaps it wasn't all necessary but suffice it to say Your Honor, at this juncture there is no question but that the jury can come back on every single issue that is our burden and conclude in our favor and they may find by further conviction or belief that the leveled charges of racism and racist behavior were known to be false by this defendant or and it is in the disjunctive or were published with a reckless disregard for the truth. And therefore it would be inappropriate at this time to sustain a motion to strike. I reserve argument if we're going to have argument on whether Mr. Moore has now become a public figure in spite of the fact the Supreme Court of Virginia said he wasn't. I don't know when you want to take that up. I would suggest to the court in light of the hour and the issue that that is something that should only concern us at the time of jury instructions. It really isn't something we have to take up right now. I think we ought to limit ourselves to the other issues that relate to our burden of proof. Thank you.

THE COURT: All right, anything further Mr. Poindexter?

MR. POINDEXTER: No, no sir.

THE COURT: The Court has reviewed the evidence as we've received it carefully and taking into view the elements necessary to be proved for a plaintiff's verdict and the degrees of proof required we believe that there is sufficient evidence on each element to the degree required for the jury to be able to make a finding for the plaintiff. We consequently overrule the motion to strike. Now, I believe that's about all we can do this evening gentlemen, so we will reconvene tomorrow morning at 10:00.

MR. ALBRO: Your Honor, would I be correct in understanding then that my first order of business ...

THE COURT: Your first order of business would be to put on your evidence ...

MR. ALBRO: ... is to put on his wealth?

back if you'll remain outside and not come back into the court room until the Bailiff admits you.

JURY IN RECESS.

THE COURT: All right, has counsel had an opportunity to compare instructions yet?

MR. ALBRO: No, sir, we've got a set.

THE COURT: I'll give you about ten minutes to compare instructions and that may enable us to direct our attention to the areas of difference.

MR. POINDEXTER: Yes, sir, could we as a prerequisite could we start with a motion to strike?

THE COURT: Yes, I'll be glad to hear your motion. You may proceed with your motion.

MR. POINDEXTER: Yes, sir. Your Honor, first we have to start way up here with the libel or defamation. That can only be accomplished through an intent to use language or word that hurts someone with a knowledge that what you have said is false or you utterly disregard the facts as you know them to be or as they could be ascertained and you say so. Then in this case that certainly cannot be shown to exist. Whether what Mr. Fleming said was true or not, there

is absolutely no showing, noth.... nothing indicates, not one scintilla of evidence to show that he made a false charge given all of the circumstances as they existed then, or that he recklessly made an accusation of any kind against Mr. Moore or anybody else. Now he says, and it goes undisputed, that he was the first black person in the history of Albemarle County to undertake a development of any consequence, and there is ample testimony to show that he was turned down on two occasions and had unusual and weird, contorted restrictions and conditions imposed upon him throughout this process, and while all along around him, before and after, white property owners, white developers, were one way or another accomplishing what it was that they wanted to accomplish around the reservoir in the terms of commercial development. Now given those circumstances alone, he could conclude that I am, in his own mind, a victim of racial discrimination. I am black, I'm the only one attempting this, I'm the only that's ever attempted this, I'm the only one who is being frustrated in my attempts to develop, I have met all the conditions as I know them to exist in the county to initiate this development and they keep turning me down. Was he turned down by

people who were not suspect, were there any black people involved in this process? No. All of the persons to whom he had to go have been identified through the testimony of the witness that appeared before the court were white people with the possible exception of one Planning Commission member, who it was that Mr. Fisher couldn't even remember his name. So his involvement in all of this may, must not have been terribly effective or important. We don't even know what time frame this man served on the Albemarle County Planning Commission. Then he initiates a lawsuit in Federal Court, he makes his claim, says I am being discriminated against, I am being denied constitutional rights, due process, etc., they go to trial four days; the judge says listen, this is what we can reasonably infer, listen, what in the world has happened to this man? Give him his 2.5 unit density per acre. The Board is stampeded in front of Judge Turk, they run back, they go to a public hearing and give the man, after all these years, they give him 2.5 units per acre density. Chairman of the Board of Supervisors the next day gets up and says, ho....in fact a hollow victory, we ain't giving him nothing, we've still got a moratorium out there, he'll never develop

anything, goes in the court, volunteers to, voluntarily attempts to overturn the settlement by aiding the intervenors, has the same attorney to create the intervention process that had....representing him and his wife, Mr. Moore, from representing Mr. and Mrs. Bedford Moore on one day to representing the two intervening bodies on the next, all in an effort to stop Evergreen.

Now what could Mr. Fleming logically conclude from all this? All this increased concern about beautification of the reservior. Surely it had been of some concern in 1972, 1971, '69, for as long as Ivy Creek has drained into that man-made water shelter out there, it's been of some concern that one day because of pollution, run-off, chemical plants, of the Acme Visible Records, Morton plant, all drain right into this body of water and one day you'd have a problem. Everything came forth when Jim Fleming, black developer, announces his plans to create a subdivision out there. Everything converged. All at once a 37 year old house is designated a historical site, not only in Virginia, but on the Federal register. Overnight these things occurred within months of each other. Increased concern. There are four

studies commissioned of the reservoir within the context of this application, when this application is pending before officials here in Albemarle County. He is called a racist in 1975 by the newspaper because he raised the issue. The stage is set, racism. That's an exhibit in the case. Mr. Green from Richmond, Mr. Fleming from up here, they run around calling people racists, they're racists. All right. Mr. Fleming didn't sue the newspaper, I guess under the law that we know it to be. He could have, but it didn't even occur to him that he had a cause of action against a newspaper because it made a comment about him in the midst of a public controversy, a controversy of great interest in this community. Does he have a right to say anything in return? I mean, do we have a First Amendment or do we not? So he says, after all of this has fallen upon him, racism, I've been trying now for three or four years to effect a housing development out there, I am frustrated, these people are stopping me, they claim it's pollution, they claim it's eutrophication, they claim whatever it is, but I know what it is. I am black, I am being discriminated against; and he was vindicated four months later by the court urged settlement. He talked about things

as he perceived them. Where is the attention... where did his attention focus? It focused on the one man who was closest in his mind to all of this, the man sitting right over there. Now to rule in our favor in, on this point is not to chastise Mr. Moore, it well could be that Mr. Fleming was wrong about Mr. Moore, but that's not the issue. Did he have a right to believe that Mr. Moore was one of the....let's put it this way, ring leaders, ring leaders of this ongoing effort to deprive him of his right that he thought he had as a citizen of this country to develop property that belonged to him. Mr. Moore said in testimony, well, Mr. Fleming didn't conform to what I wanted him to conform to. He should....I was willing to dedicate my life to the public trust, Mr. Fleming was not, I thought he should have. Mr. Moore we submit has, has become by any stretch of any case that's significant, Your Honor, a public figure just as much as Mr. Fleming had become a public figure and we would concede that indeed at that time in this place he was a public figure, if not for any other reason, the paper and its attention upon him and what he was doing caused him to be a public figure.

Now does he not have a right, given the money he's spending out there, his ownership of property which he cannot do what he thinks that he has a right to do with, can he not as a free American citizen protected by our Constitution, protected by the First Amendment, protected by even something closer to us, a common law sense of privilege that a man can say something about something he owns or has a pecuniary interest or a social interest or a political interest in, can a man under those circumstances, a man can say something to people that he believes would have at least some interest in the...(inaudible). So what did he do? He said, I'm not getting a fair shake in the Progress index. Every....they've already called me racist; the reporting seems biased, I am going to an audience where I might get some attention, where I might get some sympathy. That old...the editor then, obviously he's opposed, he's not in favor of me and he goes through...we can assume that he went through his files, he pulls out the editorial where he'd been called a racist. He says, I've got to get my message through. I want to comment my way on this controversy that affects me, not only me, these are public officials making these decisions.

These are, these are tax exempt organizations, these are public...the league, League of Women's Voters, the different State agencies. I have a right to strike back, to talk back, and he does it. He goes up to the University of Virginia, he knows there's a paper up there that's widely read, probably more widely read in a certain liberal, so-called liberal segment of this community than in other parts of the community, and he addresses that community. He says, this is what's happening to me here in the shadow of Monticello; this is what's happening to my dream, just like Jefferson had a dream, he invokes Jefferson as Judge....Justice Harrison said, he compared Mr. Moore with Mr. Jefferson; Mr. Moore came out on the short end and there's nothing wrong with that. He had a right to say these things. He says this, not only does he go to the paper, The Cavalier Daily, but he also goes to the black community. He has friends in the black community; he wants to articulate to the readership of the black community at the same time what's happening to me, Jim Fleming, and he tells them. Now, Your Honor, given all those circumstances, adjust it against the fact that we have no damages. What's he going to tell the jury that all this is worth? Is

there any mention, any money been mentioned, any expert testimony as to what all...how you compute this in dollar value, what this man's embarrassment, which he may have suffered, humiliation, he may have suffered. Does that mean he's entitled to money? There are things said about all of us at different times by different people. It may have been said about Your Honor at some time or another when you turned your back on that jury decision down in Goochland. May have been all kinds of things said about you. That's unprecedented in this state. People have a right to say it. It may have hurt you, because I know, you know, the background from which you operated when you did that. But there are all kinds of things said in media and by people about other people and we get offended. Things have been said about me, Mr. Carter, Mr. Albro I'm sure, maybe even the Clerk of the Court, but that does not mean that we can use something that simply offends us or makes us feel embarrassed to cut off the right of another citizen, to speak freely about matters that affect him or her. Your Honor, there ain't nothing in this case. You know, we've been trying to tell them that since 1977, there is nothing in this case, and now that we've

heard it all, put it to rest at this point. Do what you should do as a judge, apply the law, let this man go, don't impose it upon those citizens. You know, if they'd made out a factual dispute, juxtaposition of facts of one against the other, there would be something to give to him, but it is your obligation now and you were thrust into this at a rather late date, and I would suppose that even as diligent as you are, you have not read all the law that may apply and Tom Albro and I have been working on it a long time and I'm sure we haven't read all the law that applies in this situation, but Your Honor, you should know enough about it now to do what should have been done a long time ago and dismiss this case and not leave it to those people who have no particular responsibility. There's no, there are no facts in dispute, there's nothing. Now this is framed against the fact that if you play around with the burden of proof, we find out that all this should have been, to make anything significant out of this, you got to do it not by the usual standard, preponderance, we're not even talking about that, clear and convincing. I don't know what it means to me, but I guess it means something to you as a judge, one of the cases said that it

was intermediate evidence, somewhere between proof beyond a reasonable doubt that applies in criminal cases, I never knew what that meant, and a preponderance of the evidence that applies in the usual civil case. This is a special case, special, special burden to get some money. When you start talking about infringing upon a man's right to say something, they haven't done it. And we would submit Mr. Moore, public person, man at the University, I'm just a modest little professor. Mr. Shannon comes in and says, this man is the official meeter and greeter, known all over campus, the first man that the visitors, the dignitaries at the University meet, and he greets them, makes them feel good, gets them housed and then brings them to me, he's a special man at the University. Not only that, special man out here in the community, living in a castle on the mountain, a replica of Monticello, house on the National Register of Historic Places, or about to be put on it, federal acknowledgment of the, the home, a leader in the opposition against Evergreen, the only man that we have ascertained from all of this who hired lawyers to come down and speak for him. With that, again the burden is that he must show, as he cannot, that Jim Fleming lied about him or

so disregarded his role in all of this until it was just like being a lie. And that doesn't mean make mistake about it. That simply means that Jim lied, or misconstrued everything he did to such a reckless, utter disregard for this man that it was just like a lie. Your Honor, it's just simply not here and this is the juncture to put it to rest. This is the last....could be the last litigation surrounding this mess out on the reservoir that involves this man. It should be ended today, now, should not be put to the jury, it should be taken up by you and cut off right now, because there is no case. Thank you.

THE COURT: Mr. Poindexter, in reviewing the evidence in this case, there may be evidence to sustain your characterization of the case, but as we ruled yesterday evening, we also believe that there is evidence which sustains the characterization of the case made by the plaintiff, therefore we think it is a jury question. As to the matter of damages, the Supreme Court addressed that in its decision saying that you were not limited to out-of-pocket, monetary considerations, the jury can place a value on other damages which are set out in that opinion. Consequently, we must again overrule your motion to strike.

MR. POINDEXTER: Your Honor, is that to the punitive damages? Are, are we still at that level of proof? Have they shown that after you value all the evidence, or do they just get a shot at compensatory damages?

THE COURT: Oh, if the....perhaps we can go into that in the instructions, but if they find compensatory damages, which can be damages to the man's form of embarrassment and that sort of thing, then the punitive damages can be based on those compensatory damages.

MR. POINDEXTER: But only upon a higher showing of proof. That, that's....there are two....we're right now we're faced with a, a case that rises here to....

APPENDIX M

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff

v.

JAMES N. FLEMING,

Defendant

Law No. 976-L

October 21-22, 1982

Transcript pages 527-39

tions of the court.

MR. POINDEXTER: Forgive me, Your Honor. I don't believe that there was any matter stricken by the, by the court from the evidence.

THE COURT: Yes, there....the court did strike....

MR. POPE: I recall one, Your Honor.

THE COURT: ....did strike some matter from consideration of the jury today.

MR. POINDEXTER: I, I always think in terms of exhibits or something, but I guess it was something....

MR. CARTER: The court pleases, you read that as you must not base your verdict on any, in any way upon something....

THE COURT: Sympathy, bias, guesswork or speculation.

MR. CARTER: Sympathy, okay. All right.

THE COURT: I shortened it a little bit just because I thought all counsel were familiar with the language. Granted as 8. I will read it in its entirety when the jury is here.

MR. POINDEXTER: Okay.

THE COURT: When a party has the burden of proof on an issue by the greater weight of all the evidence, this is sometimes called proof by the preponderance of the evidence. It is that testimony which you find more convincing. The testimony of one witness whom you believe can be the greater weight of the evidence. Any objection to that?

MR. POINDEXTER: We'll object to that one, Your Honor.

THE COURT: Well, that is, that instruction is correct. Your only objection is whether or not it is....whether we're talking about a preponderance of the evidence in this case, isn't that correct?

MR. CARTER: Yes, sir.

THE COURT: Perhaps we should put that aside then for the moment. When a party has the burden of proving an issue by clear and convincing evidence, he must produce evidence that creates in your minds a firm belief or conviction that he has proven the issue. That's the other side of the coin. We'll put that aside.

MR. ALBRO: I don't think there's any dispute about that.

THE COURT: No dispute about that one?

MR. CARTER: No dispute....

MR. ALBRO: We all agree that punitive damages have to be shown by clear and convincing evidence.

THE COURT: That will be granted. Maybe we ought to go ahead and make this determination at this point so we can keep these instructions together.

MR. ALBRO: All right.

MR. POPE: That's a good idea.

THE COURT: All right, I'll be glad to hear counsel on the burden of proof. Since it's your instruction, Mr. Albro, we'll let you lead off.

MR. ALBRO: Your Honor, the issue relates to compensatory and punitive damages. There is no issue at all with respect to punitive, the Supreme Court made that very clear. We can only recover them if compensatory damages are awarded. if the jury believes that we have shown by clear and convincing evidence in the instruction just read, that the charges that were false and defamatory were published as knowledge and for a reckless disregard for the truth. The preponderance issue is as to compensatory damage and there

is no requirement that the insult, embarrassment, and humiliation for example, which the Supreme Court says is compensable in this case, has to be proved by clear and convincing evidence, or that there need be any evidence of either the knowledge of falsity, or the reckless disregard for the truth on the part of the defendant, rather the issue is one of negligence, and if we should prove by a preponderance of the evidence that the defendant was merely negligent in making the false and defamatory charges, then we are entitled to recover compensatory damages, and that is as distinguished from the knowledge of false and reckless disregard for the truth standard of punitive damages. Now the, since we have a private individual who has been defamed by a non-media defendant, the standard for recovery of compensatory damages in Virginia would be negligence and of course that's a preponderance test. The decision of Gertz versus Robert Welsh, left to the states the standard by which compensatory damages would be awarded in a case of a private plaintiff. Now, the Supereme Court of Virginia has not ruled definitively on what standard it would follow in the case of a private plaintiff seeking compensatory damages in a libel suit. They have alluded to

the fact that they are going to have to make a decision some day in Burke Newspaper Publishing Corporation, but they didn't enunciate the standard. However, two cases in Virginia have addressed this and have ruled and they are Mills versus Kingsport Times News, which is 475 Federal Supplement, 1005, that's a Western District of Virginia case decided by Judge Williams in 1975. And then General Products Company, Inc., versus Meredith Corporation, 526 Federal Supplement 546; that's an Eastern District of Virginia case, decided by Judge Merhige in 1981. In both of those cases the courts ruled in Erie Educated Guess situations that if the Virginia Supreme Court were called on to set the standard by which a private plaintiff recovers compensatory libel damages, it would be negligence. That is the overwhelming majority rule in the states that have since Gertz enunciated the standard by which the private plaintiff recovers. And in Mills, Judge Williams said, it is the opinion of this court that the Virginia policy of accurately reporting public records is better served by a standard of negligence rather than actual malice. He went on to say the same, his decision is of no validity in Virginia and private individual defamation suits may recover on proof of

negligence. So we have in our instructions, tendered the rule that has been enunciated in the only cases in Virginia to treat the issue since Gertz, other than being deversity cases that came up in Federal Court, and the rules enunciated by Judges Williams and Merhige comports with the, as I say, overwhelming majority rule in the states that have taken it up, so in this case we take the position that since we have a private plaintiff, he is entitled to recover for compensatory damages if he shows that the false and defamatory statements made by the defendant were made negligibly and the burden of proof on the negligence issue is the preponderance of the evidence and our instructions so state. There is no dispute that on the question of punitive damages after the opinion in this case handed down by the Supreme Court, the burden of proof is not preponderance but clear and convincing and we have so tendered that instruction and that we must show not negligence but either knowledge of falsity or reckless disregard for the truth, and we have instructions that are precisely tailored to those two different rules of law. I might add, since I know this is an abiding concern of the defense, that there is really no basis at all for now converting the man the

Virginia Supreme Court said was a private person into a public figure, and the only way that you could justify an instruction on compensatory damages would require clear and convincing evidence of knowledge of falsity or reckless disregard for the truth, where if that person were a public figure rather than a private person and the essential elements of evidence that went into the Supreme Court's ruling in 1981, that he is a private person, haven't changed in this case. There is a great deal more evidence of the particulars of the controversy and of necessity that was introduced to show a basis for stating that it was published with reckless disregard for the truth because the truth is contained in the public record, but while the evidence is certainly far more substantial and of a somewhat different nature on that side of the question, on the public versus private individual question, it hasn't changed and I will be prepared if the court wishes to indulge that kind of argument further to cite the appropriate case law that has been handed down in the Federal courts on what makes a person a public figure versus a private figure.

THE COURT: All right, Mr. Poindexter, is your argument in favor of the higher standard of proof based on

your position that Mr. Moore is a public figure, is that your, is that your position?

MR. POINDEXTER: No, sir. No, sir, it's based only in part on that position. First of all, the decision by Judge Williams, 475 Fed. Sup., 1975, I guess can be disregarded for purposes of this argument, since the Supreme Court of Virginia commented again in the Fleming case on, on March 6, 1981. I'd like to know from counsel when Judge Merhige's opinion was authored, and whether he refers to the pronouncement of the Supreme Court in the Fleming case, whether he was guided by that.

MR. ALBRO: The Merhige decision was handed down, my recollection is, and it's just my recollection, was handed down in September of 1981, and I don't believe it referred to the Fleming case at all. The curious thing about Judge Williams' decision is that it was very....

MR. POINDEXTER: Would you....you have interrupted my argument. I just wanted you to give me some information....

MR. ALBRO: No, you asked me to point something out.

MR. POINDEXTER: ....and now you don't need to tell us anything curious about Judge Williams' opinion.

MR. ALBRO: The interesting thing....

THE COURT: Yes, well I...the court would like to hear it and this is for the court's benefit, it's not a question of the, of the jury.

MR. ALBRO: The....we're all familiar with the Erie educated guess problem that the Federal judges are confronted with and as we know in the, in the defendant opinion in this case, the Supreme Court modified the rule about special damages and they said special damages are not limited to out-of-pocket loss. You may get to the jury if you show insult, embarrassment, mortification, that's special damage too, we hereby modify the rule. Many of us who follow the development of libel law in Virginia were a little taken aback when Judge Williams said that in 1975. In fact we thought he was dead wrong, we wondered who his clerk was, how they could possibly say that because the Virginia Supreme Court had always said it was out-of-pocket loss and nothing more, but he said no, I don't take that position, it's my judgment that the rule is that humiliation by itself could be special

damage to get you to the jury if it wasn't libelous per se. Well he was right, and that's exactly what they did and I suggest to you that both he and Judge Merhige are correct too, that in the proper case when it has to address this issue, the Virginia Supreme Court will adhere to a negligence standard when a private plaintiff seeks compensatory damages.

THE COURT: All right, if you'll continue your argument now, Mr. Poindexter.

MR. POINDEXTER: Can you tell us when Judge Merhige authored his opinion?

MR. ALBRO: I've told you the best....

MR. POINDEXTER: Do you have it? Do you have....

MR. ALBRO: You want....would you like me to answer? I told you my best recollection is September of 1981, but I can't...

MR. POINDEXTER: Do you have it with you today?

MR. ALBRO: I don't have a copy of it with me.

MR. POINDEXTER: Okay. Now does it refer to the Fleming case, Moore versus Fleming?

MR. ALBRO: My recollection is that it doesn't discuss it.

MR. POINDEXTER: Okay. So that means whatever he said, he did not say it against the backdrop of having....

MR. ALBRO: No, sir.

MR. POINDEXTER: ....the wisdom of the Virginia Supreme Court in the Fleming versus Moore case...

MR. ALBRO: He addressed....

MR. POINDEXTER: ....if it's not referred to.

MR. ALBRO: He addressed an issue that the Supreme Court of Virginia didn't address in Fleming versus Moore, which is the standard by which a private plaintiff recovers compensatory damage.

MR. POINDEXTER: The very interesting thing about Fleming versus Moore, and it is significant, is probably the significant case, Your Honor, is that to Mr. Carter and myself, the Virginia Supreme Court has it both ways; it goes beyond what the Supreme Court of the United States has done in terms of punitive damages, because it goes beyond Gertz and makes a definitive finding that non-media defendants can

only have judgment rested against them upon...for punitive damage upon clear and...showing clear, clear and convincing evidence. Now that is beyond what the Supreme Court of the United States has done, so if we should anticipate....

THE COURT: Counsel are in agreement on that.

MR. POINDEXTER: ....if there's an unanswered question as to what the Supreme Court of Virginia will do when the question is directly framed, we would have to suppose that they would not, it would not fall back upon an archaic standard of negligence in a, what has to be seen now as a constitutional free speech situation. No matter who we talk about or who we are, we are still protected by the First Amendment to the Constitution of the United States, and that gives us a right to say certain things and you can't offend that protection or strip yourself of it by being negligent. I mean just, and these instructions offend me because throughout Mr. Albro uses simple negligent standard and that standard, we submit, no longer exists in Virginia, and indeed, there must be shown malice of some kind to get any kind of judgment for compensatory damages....

THE COURT: Well what is your authority for that?

MR. POINDEXTER: Pardon?

THE COURT: What is your author....I understand about punitive damages, but what is your authority that Virginia requires that standard in compensatory damages?

MR. POINDEXTER: It's a, a construction of the....it's really a construction of the Fleming, the implications of the, the decision in the Fleming case.

THE COURT: You want to point out any specific language in the Fleming case that you think is indicative of that?

MR. POINDEXTER: Forgive me, Your Honor, I've been fumbling looking for the opinion, we have it here in the folder.

MR. ALBRO: Your Honor, could I bring one sentence to your attention....

THE COURT: Sir?

MR. ALBRO: ....that may answer this problem? This is at page 892 of the Fleming versus Moore opinion. Maybe they've told us, I don't know. In their conclusion about the public figure, private person distinction, it states, since Moore's involvement at the public hearings was in his

capacity as an adjoining private landowner whose property might be affected by the proposed development, we conclude that he was not a public figure, therefore, he was not required to show as a prerequisite to recovery of compensatory damages that Fleming acted with malice that met the New York times and standards. I think that ends it.

THE COURT: This is not with malice, doesn't say it's necessary with negligence but that's really the only reasonable alternative, isn't it?

MR. ALBRO: Well, and I might point out that Mr., Mr. Poindexter refers to negligence as the archiac standard. I might correct him on that. The archaic standard was that no culpability need be proved by the plaintiff. If he could prove that it was false and defamatory, malice was presumed. We didn't have to show anything at all. The lesson of the cases that have come down since Gertz is that presumed damages cannot now be awarded, there must be some level of culpability, and as Judges Merhige and Williams tell us, and the majority of State Supreme Courts have told us, that level of culpability where a private plaintiff seeks compensatory damage is negligence.

THE COURT: All right, Mr. Poindexter, do you want to point out anything or comment on what Mr. Albro has said?

MR. POINDEXTER: Your Honor, you don't fall, fall away from actual malice to simple negligence. There is gross and wanton conduct which again, is one of those intermediate standards and the second thing that has been overlooked in all of this and, is that the issue of whether or not, and Mr. Albro keeps bringing this up as if this position has been foreclosed by this opinion, the issue of not....as to whether or not Mr. Moore was a, is or is not a public figure was never litigated before the trial court except as an afterthought by Charles Carter and myself upon post verdict attempts to try to have the judgment set aside and the....therefore the question of whether or not he was a public figure was put before the Virginia Supreme Court upon a, the most meager rec....so I would hope that Your Honor has not taken a position as to, as to that. There is an open question whether this is a factual determination to be made by the jury or whether this is a question of law to be resolved by the court, and Mr. Albro has...I mean that the...that

is up to Your Honor to, to decide, whether indeed it's a factual question or one of law. But given the resort of Virginia Supreme Court to a standard of proof greater than Gertz, it is logical to assume that they would not in the same case reaffirm or establish a negligence standard, simple negligence standard in libel cases.

THE COURT: All right, Mr. Albro, do you wish to address yourself as to whether or not the determination of whether Mr. Moore is a public figure or a private person for purposes of this case is a matter to go to the jury or to be determined by the Court?

MR. ALBRO: The, the law in every jurisdiction that I'm aware of is that the determination of public figure status is made by the court and it was made by the court in this case in the first trial and I don't know of a single case anywhere that says public figure-private person status is a determination made by the jury.

THE COURT: Do you have any contrary authority, Mr. Poindexter?

MR. POINDEXTER: No, sir.

THE COURT: All right, the court concludes that it is a matter to be determined by the court. In viewing the evidence relating to Mr. Moore's conduct and his position relative to the public, we can find no evidence that establishes him to be other than a private person. The court is also persuaded that based on the language contained in the last sentence of the first full paragraph at page 892, 221 Virginia, case of Fleming versus Moore, that the only proper inference to be drawn from that sentence is that Virginia is on the negligent standard in regard to this determination. Consequently, both instructions we feel would be proper for the jury, both as to preponderance of the evidence and the burden of proof where there is a requirement of clear and convincing evidence. It will be granted as 9 and 10 respectively.

MR. CARTER: If the court please, we want to add our exceptions to that ruling.

APPENDIX N

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III,

Plaintiff,

v.

JAMES N. FLEMING,

Defendant.

Law No. 976-L

November 19, 1982

VIRGINIA:

IN THE CIRCUIT COURT FOR THE COUNTY OF ALBEMARLE

W. BEDFORD MOORE, III,	)	
	)	
Plaintiff,	)	
	)	
v.	)	LAW NO. 976L
	)	
JAMES N. FLEMING,	)	
	)	
Defendant.	)	

MOTION BY JAMES N. FLEMING TO SET ASIDE VERDICT AND ENTER JUDGMENT FOR FLEMING OR, IN THE ALTERNATIVE, FOR A NEW TRIAL

James N. Fleming (Fleming), by counsel, respectfully moves the Court for an Order setting aside the verdict returned by the jury on October 22, 1982 and entering final judgment for Fleming or, in the alternative, granting Fleming a new trial. In support of this Motion, Fleming states:

(1) The jury was improperly and erroneously instructed on numerous material issues of law, including the following:

(a) The Court failed to instruct the jury that Fleming was protected by a qualified privilege arising

because the alleged libel concerned a matter in which Fleming had a direct personal and pecuniary interest.

(b) The Court failed to instruct the jury that Moore was a public figure and that Fleming could be held liable only in a showing that the alleged libel was made with knowledge of its falsity or reckless disregard of the truth.

(c) The Court failed to instruct the jury that Fleming was protected by a qualified privilege to make fair comment on matters of public concern.

(d) The Court erroneously instructed the jury that Moore could establish liability under a negligence standard rather than the actual malice standard required by Sanders v. Times World Corp., 213 Va. 369, 192 S.E.2d 754 (1972).

(e) The Court failed to limit the jury's award of prejudgment interest to the legal rate of 6%.

(2) The jury's verdict was against the overwhelming weight of the evidence for the following reasons:

(a) Moore failed to provide competent proof of actual injury as required by the Supreme Court of Virginia in Fleming v. Moore, 212 Va. 884 (1981).

(b) Moore failed to provide competent evidence of actual damages.

(c) Moore failed to provide evidence on which a reasonable man could conclude that the alleged libelous statements were made with actual malice, as he was required to do in order to establish liability or to recover punitive damages.

(3) The jury's verdict of $100,000 in compensatory damages and $300,000 in punitive damages plus interest at 12% from January 16, 1976 is so excessive as to shock the conscience and clearly indicates that the jury was influenced by passion, corruption or prejudice or that it misconceived and misunderstood the facts or the law. Moreoever, the award is so out of proportion to the injuries suffered that it is clearly not the product of a fair and impartial decision.

(4) Fleming's fundamental due process rights under the United States Constitution were violated because no black person served on the jury.

Fleming relies in support of this Motion on the record in this case, the trial transcript, and the Memorandum By James N. Fleming In Opposition To Motion To Strike

Affidavit of Substantial Defense filed contemporaneously with this Motion. Fleming respectfully requests the opportunity for oral argument in support of this Motion.

JAMES N. FLEMING

By/s/John Charles Thomas
Counsel

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Richmond, Virginia 23212

Of Counsel

CERTIFICATE OF SERVICE

I certify that on the 19th day of November, 1982, a copy of the foregoing MOTION BY JAMES N. FLEMING TO SET ASIDE VERDICT AND ENTER JUDGMENT FOR FLEMING OR, IN THE ALTERNATIVE, FOR A NEW TRIAL was hand-delivered to Thomas E. Albro, Esq., Smith, Taggart, Gibson, Suddon and Albro, P. O. Box 1585, Charlottesville, Virginia 22901, counsel for plaintiff.

By: /s/John Charles Thomas
John Charles Thomas

APPENDIX O

(Paid Advertisement)

RACISM

I have endeavored to realize the opportunity to provide housing and pleasant surroundings for working people--the sort of people who made this the great country that it is.

I do not expect any Farmington members to buy my houses. The tenured position-holders who live off the public dole at the expense of the working people are already well-housed, and could not be expected to live in a racially-integrated neighborhood, anyhow.

There is a great deal of irony in the fact that here in Mr. Jefferson's country 200 years after his vision of situating his beloved Monticello upon the hilltop overlooking the developing community we have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of little Monticello does not want any black people within his sight.

There is a great conflict waging between the haves and the have-nots. Obviously we have created too much financial security for the tenured segment of the economic community whose greed is repeatedly shown by their expression of "I've got mine—too bad about you."

I am a lover of liberty and freedom of opportunity. I cannot stand by and see the have-nots oppressed by the no-growth people who are living off of our work. I know that this Country did not achieve the highest living standard in the world by no-growth or by oppression of the working man, and yet today the opportunity to improve one's living standard is being violently opposed by the same people who oppose my proposed neighborhood.

Pollution of the reservoir is being used as the current excuse to foster no-growth. The solution, of course, is to remove the guaranteed incomes of these greedy people and put them in the position of seeing the world through the eyes of one seeking the opportunity to improve his or her living standard. Only then would they admit that the pollution excuse is a sham.

I will develop Evergreen, and a lot of people will benefit from it.

SIGNED: JAMES N. FLEMING

Office - Supreme Court, U.S.
FILED
JUN 1 1985
ALEXANDER L. STEVAS,
CLERK

NO. 84-1740

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE, III

Respondent

On Writ of Certiorari to the Supreme Court of Virginia

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Should certiorari be granted to a Petitioner who has deliberately distorted and fabricated a factual record on appeal that bears little relation to the true factual history of this case in violation of Supreme Court Rule 21.5?

2. Are false accusations by Petitioner of racist belief and racist behavior on the part of Respondent entitled to the protection of an absolute privilege under the First Amendment?

3. Does a private homeowner who attends a zoning hearing on a proposed housing project next to his house lose his status as a "private individual" under the First Amendment?

4. Is the evidence of Petitioner's knowledge of falsity or his reckless disregard for the truth or falsity of his statements sufficient to establish clearly and convincingly that he published with actual malice?

5. Does the Constitution guarantee that there must be blacks on a jury whenever a civil case involving this Petitioner is tried?

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No. 84-1740

IN THE UNITED STATES SUPREME COURT
OCTOBER TERM, 1984

JAMES N. FLEMING,

Petitioner

v.

W. BEDFORD MOORE, III

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The Respondent, W. Bedford Moore, III (Moore), respectfully prays that the petition for writ of certiorari of Petitioner, James N. Fleming (Fleming), be denied on the grounds that the issues raised in his petition are neither novel nor important for decision by this Court.

OPINIONS BELOW

Moore adopts Fleming's statement of the opinions below and his references to the trial transcript, trial exhibits and appendicies to the briefs filed in this Court.

STATEMENT OF JURISDICTIONAL GROUNDS

Moore adopts Fleming's statement of jurisdictional grounds for filing his petition for a writ of certiorari.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Moore adopts Fleming's statement of these provisions.

STATEMENT OF THE CASE

Moore rejects Fleming's statement of the case in its entirety. The facts set forth by Fleming are distorted, misleading and in many instances false. Fleming is attempting to fabricate a new fact history that will fit neatly into his theories on appeal. This same tactic was used by Fleming on appeal to the Supreme Court of Virginia, but the Court was not fooled, which is apparent from comparing Fleming's statement of the case in his petition to the Fleming v. Moore opinion set forth as appendix G to the petition. To correct the record, Moore submits the following statement of the case:

Moore has taught humanities at the University of Virginia since 1947 and resides in a racially integrated area of Albemarle County where he has enjoyed cordial relations with his black neighbors. His property shares a common border with a 128-acre parcel on the Rivanna Reservoir known as Evergreen, owned by Fleming and

three white partners. The reservoir is the principal water supply for more than 30,000 area residents. In October, 1974 Fleming and his white partners filed a special use permit application to build 804 housing units on the site. The land was not zoned for this size development and the housing could not be built as a matter of right (Tr. 307-08, 315, 334).

Moore knew nothing of the Evergreen plan until he was routinely notified by the county as an adjoining landowner of a site plan conference in November, 1974. At that meeting, Moore spoke with Fleming about the possibility of purchasing a small fraction of an acre of land where Moore's driveway meets the public road, a subject they had discussed several years earlier (Tr. 65). However, after reviewing plans for this massive development, Moore realized he would be opposed to it. Thinking it would be dishonorable to negotiate privately with Fleming for the property at his driveway while publicly opposing the development, Moore wrote Fleming a short, polite letter to that effect (App. A).

Pollution, not race, was the overwhelming issue in the Evergreen matter until Fleming and his attorney,

Jeroyd X. Greene, vigorously injected racism into the two hearings the County Board of Supervisors held on Evergreen I (Tr. 182-188, 279, 193-99, 290; DX 4; PX 9). Although the county planning staff recommended approval of Evergreen I, Fleming did not wait for the supervisors to meet or to express any opinions on the project before bringing race into the matter. Prior to the supervisors' first hearing he sent every member of the board a letter captioned "THE TRUE FACTS" in which he raised racial bias as an issue (DX 4). He brought Mr. Greene to that hearing and together they made racism an issue (DX 4). Serious and legitimate concerns relating to pollution of the reservoir were raised at the hearing by many persons and organizations, including the black mayor of Charlottesville, the chairman of the Rivanna Water and Sewer Authority, the executive director of the Piedmont Environmental Council, a member of the Virginia House of Delegates, the League of Women Voters, various citizens' and sportsmen's groups, professors of urban planning and engineering at the University of Virginia, a pollution control specialist for the State Water Control Board, and others, including Bedford Moore.

Moore's public opposition to Evergreen was brief and insignificant. Fleming distorts and misrepresents the record in an effort to convince this Court that Moore was a leader of opposition forces in the Evergreen matter; nothing could be farther from the truth. Moore did not organize any efforts against Evergreen. He was neither an officer nor a director of any of the numerous citizens organizations that opposed Evergreen. He gave no interviews and made no statements to the press about Evergreen. As Moore put it, "I simply opposed it on my own account" (Tr. 73-74).

The first Evergreen plan was proposed in October, 1974 and defeated by the Albemarle County Board of Supervisors in January, 1975. A second Evergreen plan — the only plan relevant to Fleming's petition to this Court — was filed in November, 1975. Fleming published his libel in January, 1976, a few days before the supervisors defeated the second plan. During that entire sixteen month period, Moore spoke no more than three times; he never spoke for more than a few minutes and there is a record of what he said on only two of those occasions. During the time when the second Evergreen plan was

considered, Moore spoke only once, and that was from his seat in the audience merely to respond to a personal attack from Fleming's attorney. He did not speak on his own initiative, nor did he speak to the merits of the second Evergreen plan.

It is important to note that Moore never "took the rostrum" except in response to personal attacks on him by Fleming or Fleming's attorney. Moore only spoke up to set the record straight after being insulted or goaded by Fleming. Fleming now portrays these brief and generally defensive remarks as being the vanguard of the opposition to Evergreen, an assertion that is as unsupported as it is preposterous.

At the January, 1975 meeting of the supervisors on the first Evergreen plan, Moore spoke for a few minutes after being personally attacked by Fleming earlier in the meeting (DX 4). Moore's remarks concerned incompatible land use and the condition of the reservoir, and took less than five minutes to deliver. The verbatim transcript of that meeting is 27 pages long; Moore's comments occupy less than a full page. Moore's comments were overshadowed (indeed dwarfed into insignificance) by the extended and detailed remarks of others who

spoke in opposition to Evergreen.

Moore's only other recorded remark at a public hearing occured twelve months later when the Albemarle County Planning Commission considered the second Evergreen plan. Fleming's attorney questioned where Moore was when another housing development near Evergreen was considered by the commission, a question which Moore perceived as a suggestion of hypocrisy on his part (DX 1). Moore's entire comment was that he was present when the other development was considered and he then asked the chairman of the commission if personal attacks were to be allowed at the meeting (DX 1). Moore did not comment on Fleming or Evergreen at that meeting. This is the only public appearance that is relevant to the petition since Fleming's libel only concerned his second Evergreen plan.

Moore did not become identified in the public eye as a leader of the opposition to Evergreen. When questioned by Fleming's counsel at trial on this subject, Moore's attorney during the Evergreen controversy stated:

> I don't think the public knew about it. Perhaps people that attended those meetings might have seen him. But his name in a public sense might have appeared in the newspaper once or twice in three years.(Tr. 289)

Not surprisingly, Fleming never bothers to advise this Court of the enormous public sentiment against Evergreen and the many individuals and organizations who, unlike Moore, did play significant roles in preventing the rezoning of the Evergreen tract (Tr. 295-98, PX 8, 9, 10, 11, 12, 13, 17, DX 1, 4, 8). Fleming's assertion that "Moore's efforts to obstruct County approval of Fleming's development were successful" is pathetic. There was no evidence that Moore's brief remark had anything to do with the supervisors' disapproval of the second Evergreen plan. However, Fleming's statement of facts might lead this Court to conclude Moore's opposition was the sole, proximate cause of the defeat of the plans. This assertion is groundless. (See App. B).

Evidence at the second trial of libel suit clearly established that Fleming used race as a weapon to intimidate and harass his opponents, including Moore. Fleming injected race as an issue in the Evergreen development as early as October, 1974 and vigorously renewed it at the supervisors' hearings on the first plan (Tr. 176, 182-88, DX 4, PX 9). His comments were so outrageous that the local newspaper published an editorial

citing the numerous dangers to the reservoir posed by Evergreen and criticizing what it viewed as an obvious attempt by Fleming and his attorneys to use race as an excuse or weapon to obtain approval for Evergreen since it might not be approved if considered solely on its merits (Tr. 45-47; See App. D).

Fleming's first plan was defeated in January, 1975. There was no "Evergreen controversy" during the period January through November, 1975. The time that elapsed between the defeat of Evergreen I and the submission of Evergreen II is important but is poorly detailed in Fleming's petition. Moore's house, Shack Mountain, was recognized by the Virginia Historic Landmarks Commission during the summer of 1975 and had been the subject of considerable scholarly comment and attention over the years (Tr. 59, PX 2, DX 2, PX 12). It was designed by Fiske Kimball and was recognized for its unique place in American architectural history (Tr. 329, 361-371). Moore neither requested nor participated in the award of the landmark designation (Tr. 363). As early as 1972, Albemarle County asked Moore if he would consider his home for inclusion in an historic zoning district (Tr.

58-63, PX 3). Shack Mountain's landmark designation did not come "during the height of controversy over Mr. Fleming's housing development" (Pet. 7) for there was no Evergreen controversy during the summer of 1975. After Evergreen I was defeated there was no indication Fleming would ever resubmit his plans (Tr. 434).

During the summer of 1975 the local governments responsible for the reservoir implemented plans to study protection and reclamation measures. As the community's chief source of drinking water, the reservoir has been a public concern of local governments since 1971 (Tr. 350-52). In June and July, 1974, before Evergreen I, the supervisors, Charlottesville city council and planning district commission received evidence regarding pollution, agreed the reservoir was in serious danger of eutrophication from runoff from housing development and other human activities in the watershed and appointed a public panel to study measures to address the problem (Tr. 298-99, 343-45, 350-52; PX 10, PX 11, PX 13). The environmental concerns regarding the reservoir were not a sham concocted to defeat Evergreen (Tr. 308-09).

In the summer of 1975 the panel recommended and the local governments retained professional consultants to study the pollution problem and propose solutions. (Tr. 301-02, 321-22), Fleming had knowledge of this action. Also, the Albemarle County soil erosion and sedimentation ordinance was amended that summer to preserve the reservoir (Tr. 343-44). Ultimately, all land in the watershed was downzoned to address pollution problems (Tr. 318-19). Moore rejects as unsupported by any evidence the characterization that his brief comment at an August, 1975 supervisors' meeting dealing with the general subject of conservation zoning was part of his crusade as a "public leader" against Evergreen (Pet. 9). His comments were not made with reference to Fleming or Evergreen (Tr. 79-80) and Fleming never testified that he relied on or even knew of Moore's August, 1975 appearance before libeling him.

In November, 1975, Fleming hastily filed his second Evergreen plan after a group of conservation-minded supervisors were elected to take office in January, 1976; protection of the reservoir had been a central issue in that campaign (Tr. 434). Environmental concerns were

again raised, this time bolstered by an exhaustive study of pollution of the reservoir (Tr. 301-02, 321-22) and an amended local soil erosion ordinance to preserve the reservoir (Tr. 343-44). Fleming's second Evergreen plan, like the first, failed to address the county's water pollution concerns (Tr. 198-99, 295-305, 342-43, 345-46, PX 9, DX 1).

Fleming published his libelous attack on Moore just prior to the supervisors' consideration of his second plan. He chose to publish it in the student newspaper of the University of Virginia where he knew Moore made his livelihood (Tr. 224-28). Fleming acknowledged he believed university students would respond to a racially-motivated appeal since, "[w]henever you talk of racism they show a certain amount of interest, the better type of students show a certain amount of interest" (Tr. 229).

Fleming's accusations of racist belief and racist activity on the part of Moore were utterly false. Moore and several witnesses proved he was not a racist. Evidence showed Moore had been raised to abhor racism and had never said or done anything that could be construed as

racist. Fleming produced no evidence at trial tending to suggest there was any truth to his defamatory charges.

Despite the falsity of his charges of racism, Fleming characterizes his charges as mere opinion and suggests that he "candidly" stated that he sincerely "believed" Moore was a racist. Fleming's testimony in this regard, as in most respects at the second libel trial, was inherently incredible. He was impeached on the stand with his own prior sworn testimony twenty-five times (Tr. 177-78, 180-81, 191-92, 193, 202-03, 203-04, 208-09, 219, 225, 225-26, 227-28, 228-29, 230-31, 232-33, 233-34, 238, 395, 398-401, 401, 402, 401-04, 404, 418, PX 14, and PX 15).

At trial Fleming attempted to prove his factual allegations of racism against Moore but failed. The record shows that prior to January 15 and 16, 1976 when the libel appeared, there was no information from which Fleming deduced Moore was a racist. His effort to create the illusion that such information existed is in two parts. The first consists of an amalgam of some conversations regarding a spot of land at Moore's driveway and the tree buffer which the county inserted as a condition

of approval for Evergreen II. The second consists of Fleming's charge that Evergreen was treated differently from developments around the reservoir proposed by whites and that public opposition to Evergreen arose due to his race, whereas white developers faced no similar opposition.

Fleming would have the Court believe that Evergreen opposition, the tree buffer, land at the driveway and Moore all became one in Fleming's eyes. But this blending of perceptions has occured on appeal; it did not occur before Fleming published his attack on Moore. Fleming is manufacturing a record to convince this Court he believed Moore was a racist before he published his libel.

In 1971, Moore and Fleming met when Fleming appraised some fire damage to Moore's trees (Tr. 67-68). They discussed the possibility of Moore purchasing a fraction of an acre where the driveway to Shack Mountain meets the public road. Moore's property comes to a point there crowding the driveway. Nothing came of this brief discussion (Tr. 65, 68). When Evergreen I was filed three years later, Moore was notified of the plan as an adjoining landowner, and again raised the possibility of this

small purchase with Fleming; however, after reviewing the plans for Evergreen I, Moore felt he could not support the project and did what he felt was the honorable thing in writing Fleming to say he felt he could not negotiate with him privately but oppose him publicly (Tr. 65-66; PX 4). Fleming never testified that he suspected any racial motivation in Moore's brief inquiries about acquiring a small piece of land at his driveway. Indeed, Fleming never testified at all about his talks with Moore regarding the driveway. Yet, now, he asserts this as a basis for his libel. He did not (and could not) "perceive" that the speck of land Moore sought to purchase at his driveway "was strikingly similar" (Pet. 10) to the 100-foot tree buffer imposed by the county on Evergreen II simply because they were not the same property. The buffer was not a spot of land at Moore's driveway; it was a one hundred foot wide, three thousand foot long strip that meandered along the steep, hilly border between Shack Mountain and Evergreen consisting of approximately eight acres (Tr. 209, 276, PX 8, PX 17).

At Petition page 10 Fleming reasserts that prior to publishing the libel he suspected some link between

the buffer and land at Moore's driveway. He cites pages 191-93 of the transcript to support his contention that he saw the buffer as the work of Moore "especially since Moore had previously negotiated with Mr. Fleming for the purchase of a buffer that was strikingly similar, at least to Fleming, as the buffer that the Planning Commission required." There is absolutely nothing whatever at pages 191-93 or elsewhere in the record that suggests Fleming connected the buffer to Moore's inquiries about his driveway before he published his libel. Indeed, his familiarity with his own project was so superficial he had a difficult time recalling whether the buffer was inserted as a condition to Evergreen I or II (Tr. 192-93).

Fleming suggests in his petition that he believed he was treated differently than white developers and Moore was not concerned with development by white people around the reservoir (Pet. 12). Even if the county government discriminated against Fleming it would not be relevant to the issue of Moore's alleged racism. However, his charges against the county are as poorly documented as those against Moore, and since he chooses

to include them in his petition they should be examined.

Fleming's allegations of discriminatory treatment are two-fold. First, he alleges the county imposed conditions on Evergreen it did not require of white developers (Pet. 12). Second, he asserts that Moore and others who oppose Evergreen did not oppose white developers near the reservoir (Pet. 12).[1]

In terms of other developments around the reservoir that Fleming used for comparison, he focused on two; Panorama and Ivy Farms (Pet. 11). However, unlike Evergreen, these projects were zoned for their proposed densities and did not require rezoning, and Fleming was aware of this (Tr. 307, 325, 334, 487-489). They only required site plan approval (Tr. 315). Further, Fleming never cited a single instance known to him before his

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[1]Fleming mentions in a footnote on page 12 that he abandoned his development plans and "dedicated" the land to a public park. He did convey his property for public use, but it is suggested he suffered some penalty in doing so. Rather, he was paid $335,000.00 for land he had acquired less than ten years earlier for approximately $35,000.00. (Tr. 394, 485-87, 499). Fleming also realized an enormous tax benefit from selling the land at fifty percent of the fair market value to the charitable institution.

libel was published in which any developer, white or black, obtained a rezoning near the reservoir such as Evergreen required. Additionally, Fleming fails to mention that the "white developments" were properly zoned from the outset.

Fleming conceded he had not attended many meetings where the county considered other developments around the reservoir, either before or contemporaneously with Evergreen, nor did he have much knowledge about the nature of any public opposition to developments proposed by whites (Tr. 195-97). Indeed, the fact that projects developed by whites were approved (regardless of their zoning) was essentially the only basis he had for concluding he was the victim of racism (Tr. 195, 197, 218-19). It is not true that Fleming knew that conditions had not been imposed on white developers. By his own admission, his familiarity with other developments was scanty at best. In fact, he never testified to any personal knowledge of conditions attached to other developments. It is not true that Fleming satisfied conditions that were imposed by the county and thereafter new ones were created such that he was being "conditioned" into oblivion (Pet.

12). The county planning staff recommended approval of Evergreen I with 10 or 15 conditions depending on the supervisors' vote, and recommended approval of Evergreen II with 16 conditions. The chief reason Fleming's plans were rejected was that he never satisfied the environmental concerns of the staff and supervisors and his engineer did not address them in the second Evergreen plan (Tr. 198-99, 295, 305, 341-43, 345).

It is literally true that Fleming "did not see Moore opposing those [white] developers" (Pet. 12), but this might lead one to conclude he knew for a fact Moore had not opposed other developers. The fact is he knew absolutely nothing about whether Moore did or did not oppose them. Before Fleming published his advertisement he had no information to suggest that Moore failed to oppose other developments around the reservoir. He was impeached with his prior sworn testimony when he stated at trial that the developer of Ivy Farms told him Moore did not oppose that development, and then admitted he had not talked to the developer (Tr. 202-03). He also conceded that he did not know whether Moore opposed Panorama because Fleming never talked to its

developer about Moore's opposition or lack of it regarding Panorama (Tr. 203-04).

Fleming repeatedly testified hypothetically regarding Moore and others who opposed Evergreen, stating they would be racists if they had not opposed white developers (Tr. 194-95), but adding he did not know that they did not oppose those developers (Tr. 195-97). Indeed, he undoubtedly knew otherwise. He was told specifically that opposition to Evergreen was not unique at the very first meeting of the board of supervisors on Evergreen I on January 22, 1975. Marsha Mashaw of the League of Women Voters responded directly to Fleming's and his attorney's charge that white developers had not faced opposition around the reservoir (DX 4):

> I would also like to add something that is not in my statement, but that is in response to something that was said earlier. That is, as you, the members of the Board of Supervisors know, the League of Women Voters has appeared before you many times either to speak for or against petitions, special permits, and zoning requests which have been before you. We have consistently opposed high density zoning around the Reservoir. We have been advocating conservation zoning for several years around the Reservoir and I might add that one of our Vice-Presidents has not been too happy about this. But this is a policy of our Board, and we have been

> before you many times. I think your record will also show that we opposed the Hollymead development mainly because it was not going to have any low cost housing in it. I think the record will also show that whenever any large developments have come before you one question that the League has consistently asked is what are going to be the provisions for low and moderate income people. So, I think it is unfair to say that the people who are before you tonight are here only for this particular instance and have never been before you at other times. Thank you. (DX 4).

At trial, Fleming repeatedly referred to the approval of Panorama by the county (Tr. 186, 194, 196-97) and asserted it was built (Tr. 194), but his own witness, supervisor Chairman Gerald Fisher, established that Panorama had not received county approval and was never built (Tr. 436-38). Fisher also established as part of Fleming's case in chief that race played no part in the county's treatment of Evergreen (Tr. 458-59).

In summary, Fleming's best hope of having his case heard on appeal is through shocking distortions of the trial record and history of the case. Fleming cannot rest his petition on the facts as they actually exist; he knows certiorari will be denied. He creates, therefore, a fairy tale consisting of half-truths, innuendo and lies,

much to the same effect of his testimony at trial wherein he was impeached twenty-five times.

ARGUMENT

In accordance with Bose Corporation v. Consumers Union, 104 S.Ct. 1949 (1984), the Virginia Supreme Court conducted an independent examination of the entire record in order to ensure that the judgment of the trial court did not consistute a forbidden intrusion on the exercise of free expression. See Petitioner's App. G-26, 35. Moore submits that upon such an examination, this Court will also conclude there has been no intrusion on the exercise of free expression by the trial court.

I. THE PETITION SHOULD BE DENIED PURSUANT TO SUPREME COURT RULE 21.5 BECAUSE PETITIONER HAS FAILED TO ACCURATELY PRESENT THE FACTS ESSENTIAL TO A READY AND ADEQUATE UNDERSTANDING OF THE POINTS REQUIRING CONSIDERATION.

As Respondent's Statement of Facts and the following argument sections make clear, Petitioner has deliberately distorted the factual record below and has fabricated certain aspects of it in an effort to have certiorari granted in this case. Such conduct should not be rewarded.

Respondent submits that such inaccuracy and

distortion of the record is sufficient reason for denying the petition, pursuant to Rule 21.5, and the Court is urged to do so.

II. FLEMING'S FACTUAL ASSERTION THAT MOORE HELD RACIST BELIEFS AND ENGAGED IN RACIALLY-DISCRIMINATORY BEHAVIOR IS NOT ENTITLED TO CONSTITUTIONAL PROTECTION

Fleming relies heavily on this Court's language in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), that there is no such thing as a false idea, to suggest that if any idea enters one's head, however far-fetched or fanciful, it is somehow entitled to constitutional protection. The extreme application of this curious theory is found in Fleming's assertion at page 42-43 that since he subjectively concluded he was the victim of racism by Moore, having no facts to support that conclusion, his factual assertion of racist belief and conduct against Moore was an "idea" or "opinion" entitled to constitutional protection.

Fleming misses the point entirely by arguing that he reached a conclusion regarding the motivation of his opponents and simply had no "serious doubts whatsoever" that this "opinion" might be factually

incorrect. Fleming is deliberately blurring the line between fact and opinion to create a false impression of what he thought and intended. At trial, and later in his appeal in the Supreme Court of Virginia, Fleming attempted to show that Moore conducted himself in a specific fashion that indicated to Fleming he was opposed to Evergreen because of Fleming's race and/or the race of those persons who might live at Evergreen. He did not state any of these facts in his libelous advertisement, but clearly implied his accusations were based on certain undisclosed facts known to him.

Fleming captioned his libelous advertisement "RACISM" and Moore is the only living person named in the body of the advertisement. Among other things he charged:

> ...We have a replica of Monticello upon the hill overlooking my property which is occupied by a man who wants to deprive working people of the same opportunities that Mr. Jefferson sought for them. Mr. Jefferson even located his slaves' quarters down the hill from his house, but Bedford Moore, the occupant of Little Monticello does not want any black people within his sight.

This false and defamatory attack on Moore is part of

a lengthy diatribe in which Fleming endeavors to create the impression that he is privy to specific facts arising out of the Evergreen controversy that support his accusations of racist belief and conduct on the part of Moore. Not only are the facts alleged about Moore untrue, there are simply no facts to support Fleming's conclusion that Moore was guilty of racially-motivated conduct. Under any standard enunciated since Gertz for delineating constitutionally-protected opinion, this diatribe is not protected "opinion" under the First Amendment.

Fleming's reliance upon Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984) (en banc), cert denied, (May 28, 1985), to support his contention that his libel was merely opinion is persuasive only so far as one accepts Fleming's factual fabrications and his extreme simplification of the Ollman holding. For example, Fleming states the Ollman court held that an "accusation of 'Marxism'" was constitutionally protected opinion (Pet. 23). Fleming broadly analogies the "Marxism" accusation and its underlying facts to the "racism" charge and the facts of this case (Pet. 24). The analogy is absurd. Fleming and his counsel must be aware that the allegedly

defamatory language in Ollman was not an "accusation of 'Marxism'" but a series of statements relating to Ollman's activities as a political activist and college professor. In fact, Ollman is a self-professed Marxist incapable of being defamed by an allegation of Marxism. 750 F.2d at 987, opinion page 35. "Much like the term 'Marxist' that was examined in Ollman," Fleming continues, "the term 'racism' is commonly understood to be a term that is 'hopelessly imprecise and indefinite.'" (Pet. 24). But the term "Marxist" was not examined in Ollman. Rather, the court examined, inter alia, the sentence "[Ollman] is an outspoken proponent of political Marxism," 750 F.2d at 987, opinion page 35, which it found to be a "loosely definable, variously interpretable statement of opinion." Id. The court speculated that "the trier of fact in assessing the statement would have the dubious task of trying to distinguish 'political Marxism' from 'nonpolitical Marxism,' whatever that may be." Id. Compare that allegedly defamatory statement with Fleming's factual assertion that "Bedford Moore, the occupant of Little Monticello, does not want any black people within his sight." Petitioner's App. O-2.

The Ollman court also examined the statement "[Mr. Ollman] is widely viewed in his profession as a political activist," which was found to be too "hopelessly imprecise and indefinite" to amount to a statement of fact. 750 F.2d at 987, opinion page 36. Fleming relies on this finding to support his new contention that an allegation of racism against Moore is also "hopelessly imprecise and indefinite." (Pet. 24, 25). But at trial, Fleming had no difficulty with precision of definition:

> Q All right, sir. The caption of your ad is "Racism", is it not?
>
> A Correct.
>
> Q And you didn't just pick that out of the air, you got that from Webster's Dictionary, didn't you?
>
> A Correct.
>
> Q In fact you got it from Webster's Third International Dictionary, did you not?
>
> A Correct.
>
> Q And when you used the word racism you had something in mind, you had a dictionary definition, did you not?
>
> A Racism in my...in my definition after reading it in the dictionary, to me I came to the conclusion condition. I had read many articles before labeled racism.

Q All right, sir. Would you read the definition of racism in Webster's Third International Dictionary and it's a little further down the page, there you go.

A It says the assumption that, I tell you it's hard for me to read this fine print, cultural trait and capacities are determined by biological race and that race difference, decision, decisionally race different decision from one another which is usually coupled with a belief in the inherent superiorities of the particular race and its right to dominate over others.

Q All right, sir. Is that the complete definition there?

A I don't...

Q All right and it goes on, a doctrine or political program based on the assumption of racism and designed to execute its principles, a political or social system founded on racism, correct?

A Racism, yes, correct.

Q What's the definition of racist in this dictionary?

A It's one who advocates or believes in racism.

Q All right, is that Bedford Moore?

A If he interpreted it that a way, yes.

Q And on what facts did you base your conclusion that Mr. Moore was an adherent of racism on your dictionary definition, the one you testified to that you used and relied on in this ad?

A From the action of all the activity going on that time in reference to land being developed around the reservoir.

Q All right, sir. The facts you've already testified to?

A Yeah.

Q And based on those facts, Mr. Moore fit the dictionary definition of racism, one who adheres to racism?

A Yesterday and today as far as I'm concerned.

Q All right, sir. And a racist according to your dictionary is a believer in racism, isn't that right?

A Right, correct.

Q All right, sir. And it's also true that the only living person named in your ad is Bedford Moore?

A True.

(Tr. 236-238). Even after giving this detailed definition, Fleming could not cite even one fact regarding Moore's beliefs or actions which met any of the definitional standards of the dictionary. Having painted himself into a corner with his dictionary definition, Fleming expects this Court to ignore his testimony and find his libel to be "hopelessly imprecise."

Applying the Ollman four-part test to the defamation and underlying facts in this case clearly demonstrates that the defamation is not a mere statement of opinion. The libel was precise in its terms and common usage; it was capable of being verified or proved false (which was shown conclusively at trial); it was surrounded with language that would influence the average reader's readiness to infer factual content and support, such as references to tenure, living off the public dole, the replica of Monticello, wanting to deprive working people of opportunities and pollution of the reservoir; and, finally, the setting in which the statements appeared, as was shown at trial, was designed by Fleming to inflict the most serious damage to Moore.

Fleming draws a weak analogy to Greenbelt Cooperative Publishing Ass'n v. Bresler, 398 U.S. 6 (1970), and attempts to equate Fleming's malicious defamation against a private citizen with the clear, rhetorical hyperbole quoted in the "Greenbelt News Review." This Court stated the obvious in saying, "No reader could have thought that either speaker...or the newspaper...were charging Bresler with the commission of a criminal

offense." 398 U.S. at 14. Yet, as two trial juries and the Supreme Court of Virginia have found, Fleming's libel could be and was understood to be an accusation of racist beliefs against Moore which held him up to public contempt, scorn and ridicule and injured his reputation.

Fleming draws an equally weak analogy to Buckley v. Littell, 539 F.2d 882 (2d Cir. 1976), cert. denied, 429 U.S. 1062 (1977), where a noted syndicated columnist was labeled a fascist and a fellow traveler of fascism by Littell. Here again, Fleming persists in his attempt to focus attention solely upon the caption of his libel and not the content. Littell, unlike Fleming, did not set forth false and defamatory facts in support of his characterization of Buckley.

Interestingly, Fleming does not cite that portion of the Buckley opinion which found certain of Littell's statements to be defamatory statements of fact. The appeals court affirmed the finding of libel with regard to the following statements in Littell's book:

> Like Westbrook Pegler, who lied day after day in his column about Quentin Reynolds and goaded him into a lawsuit, Buckley could

> be taken to Court by any one of several people who had enough money to hire competent legal counsel and nothing else to do.

539 F.2d at 895. The court concluded this was a factual assertion relating to Buckley's integrity as a journalist and since Buckley proved the statement was false at trial, the court concluded it was constitutionally, as well as tortiously, defamatory. Id. at 896.

Like this last actionable defamation by Littell, Fleming's charge that Moore specifically did not want blacks living within his sight and specifically intended to deprive them of opportunities rightfully theirs, are false and defamatory statements of fact. Fleming devotes less than a full page of argument to the specific charges contained in the body of the advertisement (Pet. 30-31) and nowhere does he address the specific false and defamatory statements that were the subject of this suit: the charges of Moore not wanting blacks living within his sight and wanting to deprive them of opportunities sought for them by Thomas Jefferson.

Moore submits it is no accident that Fleming devotes only one of fourteen pages of argument to the real issue at hand. Fleming never produced any evidence, direct

or circumstantial, that tended to show in any respect that Moore harbored racial bias or ill-will toward Fleming or any person, that he did not want blacks living near him or that he wanted to deprive them of rights, privileges and opportunities as citizens or working people.

More importantly, these false and defamatory allegations were factual allegations or, at best, opinions based on false and defamatory facts that clearly are not covered by the umbrella of absolute constitutional privilege under any known theory of law. See Hotchner v. Castillo-Puche, 551 F.2d 910 (2d Cir. 1977) cert. denied sub nom Hotchner v. Doubleday & Co., 434 U.S. 834 (1977).

III. MOORE WAS A PRIVATE INDIVIDUAL THROUGHOUT THE EVERGREEN CONTROVERSY AND DID NOT LOSE THE FIRST AMENDMENT PROTECTIONS ACCORDED PERSONS IN THAT STATUS

Fleming carries the "public figure-private individual" inquiry past any logical extreme. In essence, his position is that any person who speaks out in the context of a matter of public concern — even if only once — becomes a public figure. Fleming knows only too well that Moore was not a leader of the opposition to Evergreen II and

Moore's opposition arose largely from his concern for his own private residence. Indeed, Fleming testified that the chief reason he libeled Moore was because the Albemarle County Planning Commission staff insisted that Fleming leave a buffer of existing trees between Evergreen and Moore's residence, a condition that would only benefit Moore personally and was not a matter of public concern (Tr. 192). Further, not only was this buffer a major motivating factor in the defamation, the evidence established beyond any doubt that Moore did not suggest, design, or advocate the buffer (Tr. 82). Thus, the so-called "public controversy" related chiefly to a matter that was of little or no concern to anyone other than the two parties to this action.

It is also important to note that Moore never thrust himself to the forefront of the Evergreen controversy. He was dragged into it quite unwillingly by Fleming as a result of Fleming's proposed plans and personal attacks by Fleming and his attorney. Moore was simply a private homeowner whose personal residence happened to adjoin an enormous housing project planned by a group of local developers, black and white. As such, his attendance

at a public meeting, pursuant official notification to him by the county, was not unlike the resort to the processes of the courts by Mrs. Firestone in Time, Inc. v. Firestone, 424 U.S. 448 (1976). The majority in that case noted there is a certain amount of unavoidable public exposure involved when one resorts to the judicial process to exercise legal rights. 424 U.S. at 454. Moore had a legitimate interest in the Evergreen matter and had no choice but to attend the administrative meeting in order to protect his limited private interest.

The specious and preposterous nature of Fleming's public figure argument is accentuated by his repeated and unwarranted resort to ad hominem attacks upon Moore. For example, he describes Moore's involvement in the public debate as "vigorous" (Pet. 34), opposing Evergreen "with every means at his disposal" (Pet. 36) and argues Moore gave "strident voice to his opposition to the Evergreen development" (Id.) "shadow[ing] Fleming at every turn" (Id.). There is nothing in the record to support these ridiculous characterizations of Moore; indeed, Moore is a very private academician whose comments at trial and during the Evergreen matter were

self-effacing and understated. No better proof of his low-key approach to the whole matter exists than his brief, polite letter to Fleming declining to negotiate with him privately regarding land at his driveway (App. A). Perhaps Fleming feels he must "gild the lily" to make Moore look like a public figure as defined in Harris v. Tomczak, 94 F.R.D. 687, 704 (E.D. Cal. 1982). Moore is not such a public figure, nor was the famous and very public Dr. Harris in that case.

Moore's participation in the Evergreen matter is not unlike that of the plaintiff in Gertz v. Robert Welch, Inc., supra. In concluding it was plain that Gertz was not a public figure, this Court noted:

> He played a minimal role at the coroner's inquest, and his participation related solely to his representation of a private client. He took no part in the criminal prosecution of Officer Nuccio. Moreover, he never discussed either the criminal or civil litigation with the press and was never quoted as having done so. He plainly did not thrust himself into the vortex of this public issue nor did he engage the public attention in an attempt to influence its outcome. 418 U.S. at 352.

There is no evidence that Moore ever became the object of any discernable degree of public attention or comment. See Hutchinson v. Proxmire, 443 U.S. 111, 135 (1979).

Similarly, in Wolston v. Reader's Digest Association, Inc., 443 U.S. 157, 167-168 (1979) this Court held "a private individual is not automatically transformed into a public figure just by becoming involved in or associated with a matter that attracts public attention," emphasizing the importance of focusing on the "nature and effect of an individual's participation in the particular controversy giving rise to the defamation." It is inconceivable that a private individual who speaks out for a matter of seconds on one occasion at a hearing concerning Evergreen II in response to a personal attack from Fleming's attorney would become a public figure. Indeed, the gravamen of Fleming's argument is not only that any person who speaks out on any subject related to a public controversy is a public figure, but that any libel defendant who singles out a private individual as the target of his libel during a public controversy also becomes a public figure, however involuntarily and unwillingly. This theory was specifically rejected by this Court in Hutchinson, 443 U.S. at 135.

In any event, even if the trial court erred in holding Moore to be a private figure it would be harmless error since Moore proved actual malice clearly and convincingly

for recovery of punitive damages. Having proved actual malice, the outcome remains the same.

IV. THERE WAS SUFFICIENT EVIDENCE OF ACTUAL MALICE TO SUPPORT THE PUNITIVE DAMAGE AWARD

The jury was instructed that an award of punitive damages required a finding of New York Times malice. "Clear and convincing evidence" was correctly and without objection defined as "evidence that creates in your minds a firm belief or conviction that [a party] has proved the issue." (Tr. 574). Viewing the evidence objectively, there can be no question but that the jury had before it sufficient evidence to find liability under the New York Times standard.

Fleming's case on appeal regarding New York Times malice consists of little more than his subjective state of mind as he chooses to tell it and he asks this Court to take his word for what he claims he believed and draw all inferences from the evidence that favor his theory of the case. While a defendant's state of mind may be relevant, there is no authority that requires the trier of fact or an appellate court to accept the defendant's word for his state of mind, his good faith or lack of malice.

One court analyzed this aspect of defamation cases quite persuasively:

> It is urged that it must be proved that the libelous publication was made with actual malice or with reckless disregard of the truth. New York Times Co. v. Sullivan; Curtis Pub. Co. v. Butts. But such proof is supplied when a totality of the circumstances suggests malice, and even though the publisher may testify that he acted in good faith (or without malice) "the facts, all the facts, are to be considered in arriving at the truth of his real motive." It is never expected that the publisher will admit his own malice. Likewise, it would impose too onerous a burden on plaintiff to expect him to bring forth a witness to testify that he overhead the publisher say that he was actuated by malice. The circumstances, all of the circumstances, must be considered, and from those circumstances, despite the publisher's sworn testimony to the contrary, a jury may properly conclude the publisher was motivated by malice.

Montgomery v. Pacific & Southern Company, Inc., 131 Ga. App. 712, 206 S.E.2d 631, 635 (1974), aff'd, 233 Ga. 175, 210 S.E.2d 714 (1974). (Emphasis original, citations omitted).

In analyzing the evidence relating to malice this Court should consider the substantial public record of what Fleming and his attorneys said, did and participated in relative to Evergreen between 1974 and 1976 which

rebuts his claims of racism and unequal treatment. Fleming never produced a scintilla of evidence of racist behavior, belief or motive on Moore's part while Moore produced overwhelming evidence to the contrary. Fleming charged that pollution of the reservoir was a "sham" to stop Evergreen, yet the unrebutted and overwhelming public evidence in 1974, 1975 and 1976 was that the reservoir was in serious peril, Evergreen would make the situation worse and neither Fleming nor his engineer offered plans to address the problem. Fleming never produced evidence tending to rebut or question the evidence relating to pollution of the reservoir, but merely stated his conclusion that it was a sham. Finally, the Court should carefully review what Fleming cites as the evidence which negates malice. It lacks both probity and force. Most of it is mere conclusion, not fact or based on fact.

For example, at page 42, he states no factual basis for his "belief" that Moore was a racist but merely a conclusion that "he did not oppose the white development on the reservoir and only opposed mine as being black." (Quoting Tr. 218-219). This self-serving remark is

revealing, however, because Fleming fails to quote the question and answer that follow this asserted belief that Mocre had not opposed other developments:

> Q. All right. And that would be Ivy Farms and Panorama?
>
> A. That's right.

(Tr. 219). This answer is instructive because Fleming testified earlier at trial that he knew nothing at all about Moore's involvement in other development controversies around the reservoir, particularly Ivy Farms and Panorama. He stated neither he nor his attorneys ever talked with Moore about his concerns relating to development around the reservoir before the advertisement was published (Tr. 201-202). He claimed the developer of Ivy Farms told him Moore had not opposed Ivy Farms, but was immediately impeached with his prior sworn testimony that that developer "hasn't ever talked to me about it" (Tr. 202-03) and then admitted he had not talked to that developer about Moore before the libel (Tr. 203). His testimony was equally unpersuasive regarding his awareness of Moore's role, if any, in the Panorama development. When asked directly whether the developer of Panorama

had ever advised him about Moore's opposition to Panorama, Fleming at first hedged and indicated that "maybe during the years of this, all this controversy I asked, I said something to Wendell, Mr. Wood" (Tr. 203), but was immediately impeached with his prior sworn testimony, which he promptly adopted as his testimony at trial:

> Q. All right. Read line 19, the question and the answer if you would please?
>
> A. I rely on this. I rely on my answer today. It is the same answer I said then.
>
> Q. All right. Q: Have you ever talked to Wendell Wood about whether Mr. Moore had ever opposed his development? A: No. I didn't ask him specific questions about it. I didn't ask him specific questions but I know he didn't. I know he didn't get opposed. He didn't get opposed like I did because he is white. (Tr. 204).

Yet, Fleming was present at the December 2, 1975 Planning Commission hearing on Evergreen II when Moore indicated he was present at the hearing on Panorama. The jury was justified in concluding Fleming's testimony was a fabrication designed to create the appearance of having a good faith belief. One cannot profess to having a subjective belief based on observed or understood

facts when one admits the "facts" are fabrications.

At page 42, Fleming excerpts his testimony at page 490 of the transcript regarding his alleged frustration with the conditions imposed on Evergreen while other developers were obtaining approval of their plans. This testimony has nothing to do with Moore or anything that may have led Fleming to think Moore was a racist. Aside from that, Fleming, a real estate expert, knew perfectly well that other projects on the reservoir were zoned for high density development (Tr. 487-489), which his was not.[2] Yet, as always, he "perceived" every outcome in racial terms (Tr. 490).

Fleming repeatedly urges this Court to look at the evidence "through his eyes" and feels it is enough to say he had no doubts about Moore's racism. But there

---

[2] On page 45, Fleming states, "Two developments along the reservoir were approved just as Fleming introduced Evergreen II." The statement, which is not cited to the record, is false. A footnote on the same page quotes James B. Dick, the county zoning administrator who took office six months after Evergreen II was defeated. Fleming's petition does not reveal that Mr. Dick's second answer in that footnote was objected to and the court instructed the witness to answer the question that was asked. Fleming also does not tell this Court that Mr. Dick was Fleming's attorney after resigning as zoning administrator and prior to testifying at trial.

was ample evidence from which the jury could infer that any reasonable individual, and Fleming in particular, could not have published such a broadside against Moore without entertaining some question regarding its truth. The specious nature of Fleming's "beliefs" regarding Moore's alleged "use" of the tree buffer and reservoir pollution are amply detailed in Moore's Statement of Facts as are the "similarities" between the buffer and the driveway entrance. This and Fleming's "knowledge" that Moore did not oppose Ivy Farms and Panorama is the total of evidence relied upon to prove he believed that Moore was a racist. It is a sham and the jury was justified in so finding.

> Although a publisher does not have an absolute duty to investigate, a publisher cannot feign ignorance or profess good faith when there are clear indications present which bring into question the truth or falsity of defamatory statements.

Gertz v. Robert Welch, Inc., 680 F.2d 527, 538 (7th Cir. 1982)(citations omitted), cert. denied, 459 U.S. 1226 (1983).

Fleming's conduct after publishing his libel also illustrated to the jury his malicious efforts to silence

his opponents. In December, 1976, Fleming filed plans with the county for Evergreen III. When he filed that plan he also filed a civil rights conspiracy suit in federal court against Moore, several other individuals and "John Doe" (Tr. 241). He admitted "John Doe" was made a defendant so that people would be afraid to publicly oppose Evergreen III (Tr. 241). At trial, Fleming conceded that the racism he ascribed to Moore in the 1976 civil rights suit was the same racism he ascribed to Moore in his defamatory advertisement (Tr. 242). The federal court dismissed the suit on a motion for summary judgment filed by Moore, and Fleming subsequently withdrew his appeal of the district court's judgment in the Fourth Circuit (Tr. 242-46). Fleming had no more evidence of Moore's alleged racism when he filed the civil rights suit than he did before he published his advertisement. The filing of that specious action, timed as it was with the filing of Evergreen III, clearly established Fleming's pattern of maliciously intimidating his opponents just as he had when he timed his libel to coincide with consideration of Evergreen II.

Even in the context of media defamation, it has

been held that failure to seek corroboration from the most obvious source is circumstantial evidence relating to reckless disregard for the truth. Alioto v. Cowles Communication, Inc., 430 F.Supp. 1363, 1371 (N.D.Cal. 1977) aff'd 623 F.2d 616 (9th Cir. 1980), cert. denied 449 U.S. 1102 (1981). Fleming fabricated an inquiry to Ivy Farms' developer and never consulted Panorama's developer. He had no information regarding Moore's views on race or other developers. Further, it has been held that a publisher's ill-will toward plaintiff and lack of substantial independent support for his charge is relevant evidence in determining recklessness under the New York Times standard. Stevens v. Sun Pub. Co., 270 S.C. 65, 240 S.E.2d 812, 815, cert. denied, 436 U.S. 945 (1978). See also Curtis Pub. Co. v. Butts, 388 U.S. 130, 157 (1967). The timing of Fleming's advertisement and its place of publication give rise to a reasonable inference that his purpose was not, as he contended, to inform the misguided readers of the Daily Progress, but to intimidate Moore into silence and to embarass Moore to his students and colleagues just prior to the county supervisors' consideration of Evergreen II in

January, 1976.

Fleming concludes his effort by asking this Court to allow him "to rely on circumstantial evidence indicating that his opposition might be racially motivated" (Pet. 46). This "circumstantial evidence" has been largely fabricated or misstated in his petition. Indeed, the direct and circumstantial evidence in the record shows that no one participating in the Evergreen controversy, most of all Fleming, could have reasonably concluded that Moore was a racist who opposed Evergreen on racial grounds. In viewing the evidence as a whole, the jury was justified in concluding that Fleming either knew what he was saying about Moore was false, or uttered his defamation without regard for the truth or falsity of what he was saying. Fleming's protestations that he entertained no doubts about Moore's racist motivations finds no support in the record. Indeed, the Virginia Supreme Court noted that "there was substantial, credible evidence to support the jury's finding that Fleming acted with recklessness that was tantamount to a willful disregard for the truth . . . abandon[ing] all judgment and reason in composing and publishing the advertisement."

Petitioner's App. G-42,43.

Fleming relies upon St. Amant v. Thompson, 390 U.S. 727 (1968) for the proposition that Fleming must have entertained doubt about the truth of his charges against Moore (Pet. 40-41) and it is true that Justice White stated that "failure to investigate does not in itself establish bad faith." St. Amant, 390 U.S. at 733. However, he did go on to note that the

> defendant in a defamation action brought by a public official . . . cannot automatically ensure a favorable verdict that he testified with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly upon an unverified, anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports.

Id. at 732 (emphasis supplied, footnotes omitted). In reviewing the quoted language it is apparent that the jury would be justified in finding that Fleming's accusations of racism were "the product of his imagination" and

that his charges were "fabricated" much as many of his references to the record in his petition are fabricated.

Fleming's reliance on Time, Inc. v. Pape, 401 U.S. 279 (1971) is misplaced. It is true one can adopt a rational, though incorrect, interpretation of another's ambiguous conduct based on circumstantial evidence, but one must nevertheless point to some evidence that objective individuals would view as supportive of that erroneous interpretation. Pape involved a careful, thorough investigation by professional journalists who were accused of malice because the word "alleged" was left out of their report of an official summary of police activity. Id. at 282-83. Unlike Fleming, these journalists did not fabricate grounds for their report or concoct a subjective basis for their beliefs after they were sued. Pape is plainly a case where the Court was solicitous of media reports on the conduct of public officials. Id. at 290-91.

Fleming has failed to support his view of the case with evidence in the record. His advertisement was not a rational interpretation of ambiguous conduct but a malicious effort on his part to silence, through

intimidation, a well-meaning opponent of Fleming's business interests and those of his white partners. Fleming's false allegations of racism against Moore were known by him to be false and were published with a reckless disregard for the truth, and there was ample evidence to support the jury's finding.

V. THE ABSENCE OF BLACKS ON THE JURY DID NOT VIOLATE FLEMING'S CONSTITUTIONAL RIGHT TO DUE PROCESS

On page 49 of his petition, Fleming incorrectly quotes the Virginia Supreme Court as finding the compensatory award not to be the product of a fair and impartial decision. Fleming states: "The compensatory award was described by the Supreme Court of Virginia as 'so out of proportion to the damages sustained to suggest that it is not the product of a fair and impartial decision' (App. G at G-40)." This misquotation is but another distortion of the record below by Fleming. First, the quotation appears not on page G-40 but on page G-39. Second, the quotation is not in reference to the case appealed from but rather is cited by the court as precedent for reviewing a compensatory award, per Smithey v. Refining Co., 203 Va. 142, 122 S.E.2d 872 (1961).

The allegation by Fleming that a black man cannot receive due process in a civil case from an all white jury is in itself an indication of racism. Fleming has apparently concluded that all white people are inherently incapable of fairly judging the acts of black people. Such a theory is undeserving of this Court's consideration.

Although Fleming disclaims urging a "sweeping new principle of constitutional law that all juries must contain quotas of various population groups" (Pet. 47), that is exactly the remedy he wants this Court to adopt. Without some sweeping new principle of constitutional law this Court is powerless to affect the method of jury selection in Albemarle County, which in all respects conforms to the existing state and federal constitutional provisions.

Without reference to the record, Fleming makes the unsupported charge that Moore's counsel deliberately struck all black jurors from the panel. There is no evidence in the record that plaintiff deliberately used two of his three peremptive strikes to procure an all white jury (Tr. 11-23, See App. C). This is merely an assumption on Fleming's part, which is not surprising since he views

this matter as a "race case" (Pet. 50) rather than an action based on defamation.

In fact, as is abundently clear from the transcript of the voir dire (App. C), the question of racial bias or prejudice was explored at length by Fleming's counsel. There is no evidence in the record that any racial bias or prejudice was detected by Fleming's counsel, who used his three peremptive strikes in the same manner as Moore's counsel.

The law on this issue has been clear since this Court decided Swain v. Alabama, 380 U.S. 202 (1965). The Swain Court held that "a defendant in a criminal case is not constitutionally entitled to demand a proportionate number of his race on the jury which tried him." 380 U.S. at 208; see also 47 Am.Jur. 2d Jury §§164, 167 (1969). Swain also focused on the petitioner's challenge to the state prosecutor's use of peremptory strikes to exclude all the blacks who were summoned for jury duty. The Supreme Court rejected his challenge, observing that "we cannot hold this striking of Negroes in a particular case is a denial of equal protection of the law." 380 U.S. at 221.

The rationale underlining Swain is both obvious and sound. Confronted with the responsibility for examining the demographic characteristics of the parties to a judicial proceeding, the court would be required to "hand-pick" specific jurors to serve on the panel. The concept of random selection and impartiality will disappear from the jury selection process on the theory that only a member of a particular class can pass judgment on another member of the same class.

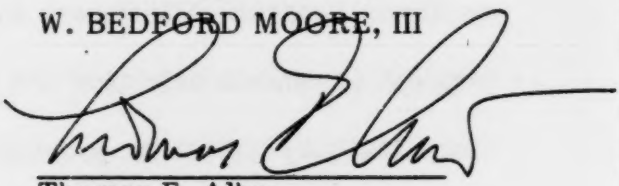
Fleming apparently recognizes the blatant undesirability of such a modification because he acknowledges that a black need not be tried by a jury with one or more blacks in every instance (Pet. 47). But he offers no suggestions as to which cases would require blacks or how to select juries from panels in a way that would guarantee black jurors short of a sweeping new interpretation of the constitution. Clearly, any change in existing law would mean certain people summoned for jury duty would in effect be beyond the reach of a peremptory strike. Surely this would be medicine far more dangerous than the alleged illness.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be denied.

Respectfully submitted,

W. BEDFORD MOORE, III



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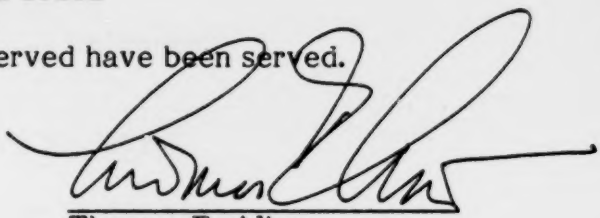
CERTIFICATE OF SERVICE

I hereby certify that on the 31 day of May, 1985 I served counsel for petitioner with three (3) copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari by mailing the same, first class postage prepaid to counsel for Respondent at the following address:

D. Alan Rudlin
W. Jeffrey Edwards
HUNTON & WILLIAMS
P.O. Box 1535
Richmond, Virginia 23212

All parties to be served have been served.



Thomas E. Albro

APPENDIX A

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III

Plaintiff

v.

JAMES N. FLEMING

Defendant

Law No. 976-L

October 21-22, 1982

Plaintiff's Exhibit 4

27 November 1974

Mr. James N. Fleming
Ideal Realty Company
304-A Ridge Street
Charlottesville, Virginia 22901

Dear Mr. Fleming:

I write to you as a courtesy to say that I have not followed up that proposed meeting with you and your partners because I have realized upon looking further into the matter, that I could not negotiate with you gentlemen in good faith and then turn around and oppose your project in the public hearings—as I feel I must do for the good of my neighbors and the county as a whole.

Let me assure you that there is absolutely nothing personal in my opposing you on this matter.

Sincerely yours,

Bedford Moore

BM:pa

APPENDIX B

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III

Plaintiff

v.

JAMES N. FLEMING

Defendant

Law No. 976-L

October 21-22, 1982

Minutes of Albemarle County
Planning Commission
of December 2, 1975

Defendant's Exhibit 1

December 2, 1975

The Albemarle County Planning Commission held a regular meeting on Tuesday, December 2, 1975, 7:30 p.m., County Office Building, Charlottesville, Virginia.

. . .

SP-537. James N. Fleming, Flamenco Enterprises, Inc., and Four Seasons West Limited Partnership have petitioned the Albemarle County Board of Supervisors to locate a Planned Community on 128.06 acres zoned A-1 Agricultural. Property is situated on the west side of Route 743 (Hydraulic Road). County Tax Map 44, Parcel 35B, and County Tax Map 45, Parcels 8, 8A, 12, 13, and 14, 17, 18, 19, or parts thereof. Jack Jouett Magisterial District.

. . .

Mr. Carr stated that he felt the following were reasons for deferring action.

1. Preliminary Plan is insufficient - general master plan should be redesigned;
2. Commercial area as far as size and location should be spelled out;
3. Input from Education Department is necessary;
4. More knowledge is needed on the common area with reference to Homeowners' Agreement;
5. More information regarding the pond and its dam are needed;
6. More engineering information is needed (regarding sediment basin plans);
7. Lot layout so as not to encroach on slopes of more than 25% is needed;
8. Staff review of Virginia Department of Highways and Transportion input is needed;
9. Complete review by the Engineering Department regarding storm water and utilities;
10. Evidence that the applicant has considered the interim ordinance regarding the protection of the Rivanna Reservoir.

Mr. Barksdale said that a definite date for another public hearing should be given to the applicant.

Mr. Puryear again asked for the courtesy of action, even if denial, in order that the request can move on to the Board of Supervisors.

Mr. Gloeckner called for the question.

The vote for the motion to defer carried by a vote of 7-1, with Mr. Easter voting against the motion.

APPENDIX C

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III

Plaintiff

v.

JAMES N. FLEMING

Defendant

Law No. 976-L

October 21-22, 1982

Transcript Pages 11-23

THE COURT: Ladies and gentlemen of the jury panel, are you all over the age of 18, citizens of the Commonwealth of Virginia, for at least six months? If any of you all are not, please raise your right hand.

(All jurors indicated in the affirmative.)

THE COURT: Apparently all are so qualified. The case that we have for your consideration today is the case of W. Bedford Moore, III, plaintiff, v. James N. Fleming, defendant. The allegation of the case is that in January of 1976, in this county, Mr. Fleming published a libel in two newspapers against Mr. Moore, I ask you now, if any of you are related by blood or marriage to Mr. W. Bedford Moore, III, or Mr. James N. Fleming? If any of you are, please raise your right hand.

(All jurors indicated in the negative.)

THE COURT: Apparently none are so affected. I ask you now if any of you or any of your immediate family have any relationship, business, social, professional or otherwise with either the plaintiff, Mr. Moore, or the defendant, Mr. Fleming or any members of their immediate families? If any of you have such relationship, of any kind, please raise your right hand?

MR. GREENWOOD: I'm a real estate broker and I've done business with Mr. Fleming.

THE COURT: Do you feel that your business relationship with Mr. Fleming in the past would make it difficult for you to render a fair and impartial verdict in this case?

MR. GREENWOOD: No.

THE COURT: All right, sir. Your name, sir?

MR. CAREY: Thomas Carey.

THE COURT: Mr. Carey, what is your relationship and with whom?

MR. CAREY: Well, I am a friend of Mr. Fleming's wife that I think...the wife that he divorced I think.

THE COURT: Well, do you feel that your friendship with Mr. Fleming's former wife would in any way affect your ability to render a fair and impartial verdict in this case?

MR. CAREY: I believe it would, Your Honor.

THE COURT: All right, I will ask that you step down and take your seat in the audience. Call the next juror.

(Mr. James Howe was brought into the courtroom at this time.)

THE COURT: All right, sir, before you are seated if you will raise your right hand and be sworn on the voir dire.

(Mr. Howe was sworn at this time on the voir dire.)

THE COURT: What is your name, sir?

MR. HOWE: James Howe.

THE COURT: Mr. Howe, I ask you now if you are over the age of 18, a citizen of the Commonwealth of Virginia for at least one year and of the County of Albemarle for at least six months?

MR. HOWE: Yes, sir.

THE COURT: The case that we are trying this morning involves Mr. Bedford Moore, III, as plaintiff and Mr. James N. Fleming, defendant. The charge is that Mr. Fleming published a libel against Mr. Moore in January of 1976 in this county. I ask you now if you are related by blood or marriage to either Mr. Moore or Mr. Fleming?

MR. HOWE: No, sir.

THE COURT: Do you have any business, social, professional or other relationship with either of these gentlemen or does any member of your immediate family have such a relationship?

MR. HOWE: No, sir.

THE COURT: All right, you may have your seat. Have any other members of the jury, upon consideration determined that they have any of the relationships that the court has previously inquired about?

(All jurors indicated in the negative.)

THE COURT: Apparently not. I ask you now if any of you have acquired any information about this alleged libel from the news media or any other source? If any of you have acquired any such information, please raise your right hand?

(All jurors indicated in the negative.)

THE COURT: Are any of you sensible of any bias or prejudice against either party to this suit? If any of you are please raise your right hand.

(All jurors indicated in the negative.)

THE COURT: Apparently none. Do any of you have any interest in the outcome of this case other than your interest as good citizens? If any of you do, please raise your right hand.

(All jurors indicated in the negative.)

THE COURT: Apparently not. Are any of you presently represented by either Mr. Poindexter or Mr. Carter who are representing Mr. Fleming or by Mr. Albro or Mr. Pope, representing Mr. Moore?

(All jurors indicated in the negative.)

THE COURT: Have any of you been...are you now represented by any of these gentlemen or have you been represented by them within the last two years? If any of you have, please raise your right hand.

(All jurors indicated in the negative.)

THE COURT: Do any of you know of any reason whatever why you should not render a fair and impartial trial to the parties in this suit according to the law and the evidence? If any of you do...

MRS. HIRSCH: Excuse me, Your Honor, are you Mr. Bruce Carter?

THE COURT: No, this is Mr. Carter over here. Do any of you know of any reasons whatsoever why you should not render a fair and impartial verdict to both parties in this suit?

(All jurors indicated in the negative.)

THE COURT: Any questions of counsel for the plaintiff?

MR. ALBRO: No questions, Your Honor.

THE COURT: Any questions of counsel for the defendant?

MR. CARTER: Have any of you read or heard anything about this case in the local...

THE COURT: The question has already been asked and answered of the jury, Mr. Carter. I am willing for you to voir dire the jury but you must not repeat the questions that have been asked.

MR. CARTER: Have you all lived in Albemarle County over five years? If you haven't raise your hand.

(All jurors indicated they have lived in Albemarle

County over five years.)

MR. CARTER: This case is going to involve a racial issue and I want to know from your own heart the truthful answer to this question. Does the fact that the people involved here are of different races, would that fact alone have an influence upon your decision in this case? If so, raise your hand.

(All jurors indicated in the negative.)

MR. CARTER: It's important now, that you be very...well, not only with the court and me but with yourself on this particular issue because you are talking about the kinds of things that make a lot of difference to our entire society. Do you feel that a person who sincerely believes that another person is a racist and says so, do you think that you can fairly and truly determine whether or not he should be punished for making a sincere statement like that? If you feel like that raise your hand?

(All jurors indicated in the affirmative.)

MR. CARTER: Do any of you belong to an organization such as NOW, National Organization for Women?

(All jurors indicated in the negative.)

MR. CARTER: Do any of you belong to the National Education Association, NEA?

(All jurors indicated in the negative.)

MR. CARTER: Are any of you members of labor unions?

MR. GLASS: Yes.

MR. CARTER: What labor union do you belong to?

MR. GLASS: Bricklayer's local union here in Charlottesville.

MR. CARTER: What's your name, sir?

MR. GLASS: Mr. Glass.

MR. CARTER: And how long have you been a member of that union?

MR. GLASS: 31 years.

MR. CARTER: Are there black members in your union?

MR. GLASS: Yes, sir.

MR. CARTER: How long have they been members of the union? Have they always been members of that union?

MR. GLASS: Yes.

MR. CARTER: Do any of you belong to any kind of organization that would be considered a neighborhood improvement organization?

MRS. HIRSCH: Yes.

MR. CARTER: Mrs. Hirsch?

MRS. HIRSCH: Yes, sir.

MR. CARTER: What organization do you belong to?

MRS. HIRSCH: Key West Cedar Hills Homeowner's Association.

MR. CARTER: Okay, what is its purpose?

MRS. HIRSCH: We are involved in community endeavors to improve roads and to lobby with local government officials for things we consider in the best interests of the subdivision.

MR. CARTER: Do you attend public meetings for that purpose?

MRS. HIRSCH: We usually appoint someone to attend any sort of...

MR. CARTER: Have you ever been appointed to attend?

MRS. HIRSCH: No.

MR. CARTER: How long have you been a member?

MRS. HIRSCH: I think about five years.

MR. CARTER: Any blacks in the organization?

MRS. HIRSCH: No, sir.

MR. CARTER: Any blacks in the neighborhood?

MRS. HIRSCH: Yes, sir. I may be incorrect about that. I'm not sure what the recent membership is. We do have a couple of black families in the neighborhood who are, of course, free to join.

MR. CARTER: I understand you also belong to a...

MR. BAKER: Yes, sir, the West Leigh Homeowner's Association.

MR. CARTER: And what's your name, sir?

MR. BAKER: Baker.

MR. CARTER: And what is the purpose of that organization? Is it the same as Mrs. Hirsch?

MR. BAKER: I think so except perhaps with one small difference that the property goes to the mid line of the road so we have to have an association to agree

on maintaining the road. We have no other function other than that really.

MR. CARTER: I see, so you are just concerned about roads?

MR. BAKER: Yes, sir.

MR. CARTER: Are you an officer in that organization?

MR. BAKER: Yes, sir.

MR. CARTER: What position do you hold?

MR. BAKER: I'm just one of the ones that gets elected. We have no specific functions.

MR. CARTER: Any blacks in the organization?

MR. BAKER: No.

MR. CARTER: Any blacks in the neighborhood?

MR. BAKER: Not that I know of.

MR. CARTER: All right, sir, what's your name?

MR. HARRISON. Harrison, I belong to Fry Springs Club.

MR. CARTER: Now is this a neighborhood improvement club?

MR. HARRISON: No, it's just a social club.

MR. CARTER: Any blacks in it?

MR. HARRISON: One.

MR. CARTER: And how long have you been a member?

MR. HARRISON: Thirty years.

MR. CARTER: And if the situation as I pointed out to you before becomes a racial issue, could you in your capacity as a member of an almost white organization render a fair and impartial verdict as far as the issues in this particular case are concerned?

MR. HARRISON: I could.

MR. CARTER: Have you all heard the term racist? — Have you all heard the term racism? If you do, tell me now or if you don't, tell me now, know the difference or is it necessary for me to explain it? Would you have any trouble dealing with the distinction between racism and racist? Think about it and be truthful with the court, with me and with yourself?

(All jurors indicated they knew the difference.)

MR. CARTER: There is a difference, you understand there is a difference, do you understand in your mind what that difference is?

(All jurors indicated in the affirmative.)

MR. CARTER: I hope and pray that all of you understand what I am getting at when you answer that you understand the difference.

(All jurors indicated in the affirmative.)

MR. CARTER: I have no further questions, Your Honor.

THE COURT: All right, you may pass the list to counsel for striking.

MR. CARTER: We'd like to get the panel identified.

THE COURT: All right, if there is a wish to have them identified, we will ask, starting with Mr. Harrison over here, give your name and then go straight down

the line.

(Panel members identified themselves.)

THE COURT: All right, you may pass the list to counsel for striking.

(List submitted to counsel for strikes.)

THE COURT: Ladies and gentlemen of the jury, the court says to you that the fact that you may be struck from the panel is in no way a reflection on your ability as a juror. Counsel are required to make a prerequisite number of strikes in each case.

THE CLERK: The following six people please stand aside as I call your names and have a seat in the courtroom: Shirley Chapman, George Cleveland, Purnell Eurbanks, Lester Greenwood, David Harrison, William J. Hicks.

THE COURT: All right, if you will identify the seven remaining.

THE CLERK: Answer as I call your name: Donald Baker, Dorothy Barkley, Fannie Clark, Cole Diggs, James Glass, Mimi Hirsch and James Howe.

THE COURT: All right, any objection to the jury panel as its presently constituted from the plaintiff?

MR. ALBRO: No objections, Your Honor.

THE COURT: From the defense?

MR. POINDEXTER: May we take up a matter, Your Honor, out of the presence of the jury panel?

THE COURT: All right, I will ask the jury to step into the jury room please.

(Jury retired to the jury room at this time.)

THE COURT: I will ask the members of the jury

who have been excluded from the panel to step into the hall please. Do not leave, just step into the hall briefly, those of you have been excluded from the panel.

(Rest of the jurors retired from the courtroom.)

MR. CARTER: If the court, please, I want the record of this trial to show that the three blacks that were on this jury, one of them disqualified himself and the other two were put off by the defendant and I want the record to show that and I want it to be very clear that the race issue in this case...he is entitled to have black people on that jury just like everybody else has and I resent the fact that they made a point, the first two were blacks, to put them off the jury and I want the record to show that's what happened and we except to it.

THE COURT: The record will so reflect. All right, you may bring in the jury.

MR. CARTER: I would move to quash the panel.

THE COURT: Motion overruled.

MR. CARTER: Thank you.

APPENDIX D

CIRCUIT COURT OF ALBEMARLE COUNTY, VIRGINIA

W. BEDFORD MOORE, III

Plaintiff

v.

JAMES N. FLEMING

Defendant

Law No. 976-L

October 21-22, 1982

Transcript Pages 45-47

Charlottesville Daily Progress
Editorial
January 26, 1975

RACISM AND THE RESERVOIR

Comes now JeRoyd X. Greene, Richmond's controversial black attorney, proclaiming that "neatly camouflaged racism" is the real reason behind the Albemarle supervisors hesitancy in giving the green light to a housing project near the South Fork Rivanna reservoir.

The reservoir, as Mr. Greene and his client well know, is already in serious trouble. Some 30,000 residents of Charlottesville and Albemarle - black and white - depend upon it for their water supply. That supply is now dangerously threatened by contaminants that are contributing to the rapid growth of marine life in the lake.

So grave is this problem, and so far-reaching are its implications for area citizens, that the city and county are considering jointly funding a major study to find, and hopefully to remedy, the causes of the reservoir's deterioration. That study should be authorized without delay.

The governing body of the county is therefore understandably and properly hesitant about permitting any

steps to be taken in the meantime which might further complicate an already serious situation.

One thing they do not need as they wrestle with the reservoir issue is having the highly irresponsible and utterly spurious charge of racism leveled at them.

The charge grows from the fact that Greene's client, the developer of the proposed $16 million reservoir project, is black. Disappointingly, the developer, Mr. James Fleming, has joined his attorney in the racism charge.

There are many aspects of our society as a whole and, indeed, that of our own area to which lingering racism contributes injustice and invidious discrimination. We join those who are genuinely concerned about human dignity and decency in roundly condemning them.

But the reservoir issue is not one of these.

If the developer and his attorney wished to demonstrate their concern for the black community, they would join the other citizens of the city and county who are urging that everything possible be done to protect and restore the reservoir so that all citizens, black and white, will be assured an adequate water supply.

Because if the efforts to save the reservoir fail,

the enormous cost of finding an alternative water supply will fall squarely and indiscriminately on the shoulders of all the taxpayers.

It may be that after an authoritative study of the matter, it will be found that the reservoir can be preserved without limiting such developments as that proposed by Mr. Fleming. If this can be done, we wish him well with his project.

But if it cannot, then no such developments or other potential polluters should be allowed.

At the moment, we simply do not know.

And until we find out precisely what is required to reverse the present deterioration of the water supply, and to protect it from further damage, no development should be permitted that might aggravate the situation.

And certainly the supervisors should not permit themselves to be swayed or stampeded into unwise actions by Mr. Greene's equally unwise and irresponsible charges.

Indeed, it might be correctly said that these charges, far more than the supervisor's well considered caution, are themselves examples of "neatly camouflaged racism."